Giving Away the Farm

Why U.S. EPA Should Reject the Ohio Department of Agriculture's Bid to Administer the Clean Water Act

Environmental Integrity Project

OCTOBER 2006

THE ENVIRONMENTAL INTEGRITY PROJECT (EIP) (http://www.environmentalintegrity.org) is a non-profit, non-partisan organization dedicated to stronger enforcement of existing federal and state anti-pollution laws, and to the prevention of political interference with those laws. EIP's research and reports shed light on how enforcement and rulemaking affect public health. EIP also works closely with communities seeking enforcement of environmental laws.

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Contents

Executive Summary

Ohio has undergone a tremendous shift toward industrialized livestock production in all sectors, including hogs, poultry, and dairy. During the 1990s, the number of large industrialized livestock production facilities known as Concentrated Animal Feeding Operations (CAFOs) more than tripled in the state. For example, according to the U.S. Department of Agriculture's (USDA) farm census, while the number of hog farms in Ohio fell from 20,062 to 4,976 from 1974 to 2002 (75.2 percent decrease), the number of hogs sold rose from 3,165,535 to 4,609,153 (45.6 percent increase). Overall, the concentration of confined animals at Ohio farms almost doubled between 1982 and 1997, and the trend appears to be accelerating.

Because of the environmental and public health impacts of these facilities, effective regulatory oversight is critical. In Ohio, CAFOs generate approximately 10,545,271 tons of manure per year, with some individual facilities creating more waste than medium-sized cities. For instance, the manure production at (b)(6) (b)(6) Dairy, a (b)(6) head facility in Hardin County, Ohio approved by the Ohio Department of Agriculture (ODA) in 2005 will be approximately equivalent to human waste production from 95,000 people, exceeding the population of the state's seventh largest city of Youngstown. Unfortunately, right-to-farm legislation restricts local governments from exercising control over CAFO siting and impacts. And the federal regulatory structure under the Clean Water Act has been in constant flux because of changing U.S. EPA rules and litigation over the Clean Water Act's reach with respect to CAFOs. Thus, it is even more imperative that Ohio state government step up its efforts to regulate the livestock industry to protect public health and the environment.

Not surprisingly, the livestock industry has lobbied hard and successfully to consolidate regulatory oversight within ODA — an agency with a "mission ... to provide regulatory protection to producers, agribusinesses, and the consuming public; to promote Ohio agricultural products in domestic and international markets; and to educate the citizens of Ohio about our agricultural industry." In 2000, the Ohio state legislature took the extraordinary step of transferring regulatory authority over livestock operations from the Ohio Environmental Protection Agency (OEPA) to ODA. This regulatory authority consists of power to issue and to enforce two types of permits: (1) state permits for construction, modification, and operation of CAFOs with 1,000 or more animal units, and (2) National Pollutant Discharge Elimination System (NPDES) permits, which are federal Clean Water Act permits issued by authorized states, including Ohio.

Despite this transfer of legislative authority, NPDES permitting authority remains in the hands of OEPA — pending

U.S. EPA approval of ODA's implementation plan for the program. If U.S. EPA grants approval, it would mark the first time in the nation's history that a state agriculture agency gained authority over NPDES permits.

As an initial matter, it is questionable whether any state department of agriculture should have environmental regulatory oversight of CAFOS. This question is underscored by ODA's mission to protect producers and agribusiness and educate the public about the industry. In contrast, OEPA identifies its mission as "protect[ing] the environment and public health by ensuring compliance with environmental laws and demonstrating leadership in environmental stewardship." For OEPA's Division of Surface Water, which currently administers NPDES permitting for CAFOs, the mission is "[t]o protect, enhance and restore all waters of the state for the health, safety and welfare of present and future generations."

Given the policy implications raised by Ohio's plan to transfer water permitting of CAFOs to ODA, it is critical to take stock of ODA's current implementation of the state operating permit program, which it has implemented since August 2002. In this report, the Environmental Integrity Project evaluates Ohio's regulation of the livestock industry since the transfer of state operating permitting authority, identifies areas for improvement in Ohio's inter-agency scheme, and considers implications of authorizing ODA to issue NPDES permits.

Program Deficiencies

EIP identifies four crucial problem areas of ODA's current program. Aside from the questions they raise about transferring NPDES authority for CAFOs to ODA, they must be addressed by ODA to protect public health and the environment.

1. *ODA does not deter noncompliance through effective enforcement.* ODA's enforcement relies on warning letters and notices of deficiencies with limited escalation, even with repeat violators. In fact, ODA has only assessed three penalties in four years — two in the negligible amounts of $200 and $700 — while over a similar time period, OEPA assessed double the number of penalties and in amounts averaging $16,786. One particularly egregious example of ODA's lax enforcement policy is Buckeye Egg Farm, which has had numerous pollution incidents. In 2003, ODA allowed Ohio Fresh Eggs to purchase Buckeye Egg Farm and it has since amassed 36 ODA notices of deficiencies without a single fine being levied against it.

2. *ODA fails to effectively regulate manure transfer from permitted farms.* If a state permitted facility applies manure to fields under its control, it is liable for resulting environmental harm. Increasingly, Ohio facilities circumvent this liability by transferring manure for land application elsewhere, with little sunshine on what happens after the permitted facility makes the hand off.

3. *ODA places inadequate restrictions on winter manure applications.* Because of the manure transfer loophole, ODA's attempt to restrict winter land application onto frozen ground is essentially nullified.

4. *ODA has reduced permit coverage and reporting requirements.* When ODA assumed the state operating permit program, up to 35 facilities — or a quarter (24.3 percent) of original OEPA-permitted factory farms — fell off the regulatory radar with the transfer of state permitting authority.

Recommendations

Given the urgent need for effective permitting and enforcement for CAFOs, EIP recommends the following improvements to ODA's program before considering any transfer of further authority to ODA:

- *Accelerate, streamline, and toughen up enforcement.* The record of enforcement against recalcitrant polluters shows an unacceptable lag of time between violations and compliance. ODA should eliminate warning letters and off-the-record notices as steps in the enforcement process. Further, there are so few instances of actual penalties being levied — only 3 final orders with penalties in four years — that facilities are far likelier to opt for the economic benefits of either long-delayed compliance or outright noncompliance. Without the "stick," or the credible threat of escalation and penalty, compliance is left to the honor system.

- *Close manure transfer loophole by establishing producer-based liability.* For transferred manure, ODA should adopt a policy presumption that clearly assigns liability for discharges and spills to manure producers. For example, Wisconsin holds producers liable for all manure discharges and spills, including spills of manure land applied by a third party. In order for a producer to transfer liability, it must obtain written approval from the state, and only may do so in enumerated circumstances.

- *Bring medium CAFOs under state operating permits.* To supplement regulation of unpermitted CAFOs, ODA should work to bring more existing facilities under state operating permits. A pragmatic policy could leave existing permitting thresholds in place as a baseline requirement, while imposing a new requirement on medium CAFOs to obtain state operating permits if they violate best management practices as established under Ohio's agricultural pollution abatement rules. This requirement would parallel federal rules that place NPDES permit requirements on medium CAFOs that discharge to state waters. Since few unpermitted facilities wish to face the permit review and application process, a violation-based permit requirement would motivate more facilities to comply with best management practices. ODA could then focus on the medium-sized operations and bring an end to the cat-and-mouse game of manipulating facility sizes as a means of avoiding inspection and enforcement.

- *Require annual reports for ALL facilities.* The annual reporting requirement under the NPDES program should extend to all permitted facilities and all certified manure brokers. When a state agency receives a location-based report of a manure discharge, an investigator should have immediate access to a map that identifies any nearby fields that receive manure, the brokers who apply it, and the facilities that produce it. At the very least, OEPA's three-year reporting requirement for new facilities should be re-implemented. More reports will also create more information on appropriate design standards and changes to future rules.

- *Restrict wintertime manure transfers.* Restrictions on wintertime application of manure must by definition extend to wintertime distribution and

utilization of manure. Distribution and utilization is a code phrase for land application at fields not under a permitted facility's control. It is a self-defeating exercise for ODA to place restrictions on manure application to frozen or snow-covered ground while placing no restrictions on the amount of manure that facilities can transfer during winter months. Indeed, ODA's relatively aggressive enforcement of freeboard violations in the winter may often have the unintended consequence of increasing winter applications by third-party brokers or applicators. Oversight of manure brokers is minimal. They sign an agreement with the manure-producing facility promising to use best management practices, without facing any enforceable permit terms.

- *Hone inter-agency tools.* State agencies should develop a common database to log complaints, compile environmental violations, and track compliance at CAFOs. In addition, for every manure-related entry in the common database, agencies should identify the original source facility producing the manure — whether or not the agency has determined that the source facility is "at fault." Tracking manure-related incidents on a source-facility basis will enable speedy, targeted investigations of repeat violators.

- *Learn from past missteps.* Prior to any final transfer of water permitting authority, ODA and OEPA should prepare comprehensive reports to identify problems that occurred during the state-permit handover in 2002. While EIP has found certain areas of weakness and raised questions about this transfer, the affected state officials and state agencies are in a better position to apply these lessons to any further transfer of authority.

- *Report to citizens.* The unavailability of basic enforcement and compliance information has broad implications. Public access is critical because it allows citizens to make informed decisions regarding environmental issues that affect their communities. Citizens also need compliance data in order to assist U.S. EPA and the states in ensuring that environmental violations are resolved. Moreover, the public's direct access to compliance information provides incentives for regulated entities to comply with the law.

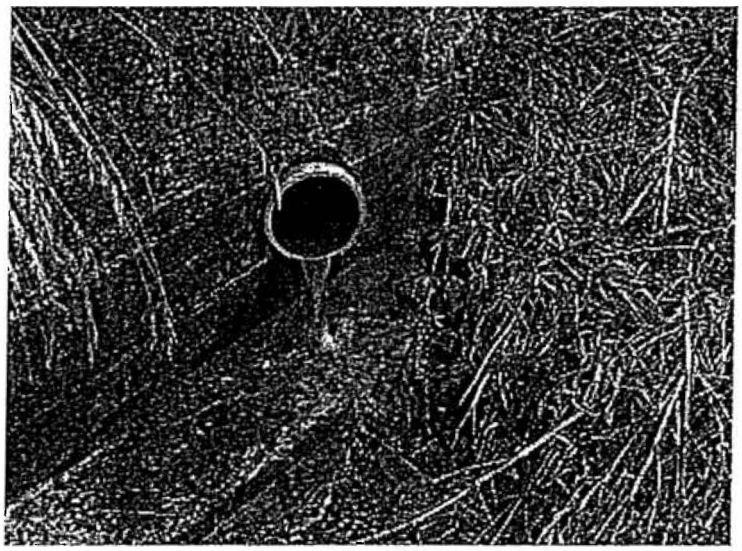
  Finally, providing information on the internet will free up more resources for core permitting and enforcement activities. ODA should post key enforcement information on its website, and all state agencies should post their CAFO databases related to discharges and fish kills on their websites.

Introduction

Concentrated animal feeding operations (CAFOs) are transforming America's agricultural landscape.[1] CAFOs are animal factories, where huge numbers of poultry or livestock are confined and fed inside manmade structures. In recent decades, this industrialized model of livestock production has supplanted sustainable forms of agriculture such as traditional family farming and ranching practices in many areas of the country. While industrialized operations achieve efficiency and scale in food production, with the largest 2 percent of U.S. livestock farms now producing 40 percent of all the nation's animals,[2] factory farms also have an unprecedented impact on the environment, health, and society of neighboring rural communities and downstream cities.[3] Moreover, the factory farm industry, and its political allies, leverage vast wealth[4] and influence to undermine efforts at the federal, state, and local level to regulate factory farms effectively.[5]

The rising predominance of the CAFO model has thus created a disturbing dynamic of increasingly grave environmental risk combined with increasingly well-funded opposition to environmental regulation and enforcement.

Ohio is at the forefront of these developments as demonstrated by several factors. First, the state has undergone a tremendous shift toward industrialized livestock production. The number of CAFOs in the state more than tripled during the 1990s.[6] For example, (b)(6) (b) Dairy Development, responsible for luring approximately 60 large dairies to the Midwest from Europe since 1998, "helped relocate more Dutch farmers to Ohio than any other state."[7] The U.S. Department of Agriculture's (USDA) farm census also shows a startling concentration of livestock production in Ohio. For instance, while the number of hog farms in Ohio fell from 20,062 to 4,976 from 1974 to 2002 (75.2 percent decrease), the number of hogs sold rose from 3,165,535 to 4,609,153 (45.6 percent increase).[8] In less than 30 years, annual production shot from 158 hogs per farm to 926 hogs per farm. Overall, the concentration of confined animals at Ohio farms almost doubled between 1982 and 1997,[9] and the trend appears to be accelerating.[10]



Manure-laden discharge from 12-inch tile under land application field. SOURCE: OEPA NOTICE OF VIOLATION TO (b)(6) TURKEY FARM (APRIL 28, 2004)

Second, parallel with the shift to concentrated production, the livestock industry has lobbied hard and successfully to consolidate regulatory oversight within the Ohio Department of Agriculture (ODA).[11] In 2000, the state legislature took the extraordinary step of transferring regulatory authority over livestock operations from Ohio Environmental Protection Agency (OEPA) to ODA.[12] This regulatory authority consists of power to issue and enforce two types of permits: (1) state permits for construction, modification, and operation of CAFOs with 1,000 or more animal units,[13] and (2) National Pollutant Discharge Elimination System (NPDES) permits, which are federal Clean Water Act permits issued by authorized states.[14] While ODA has administered state permits since finalizing the Livestock Environmental Permitting Program in August 2002,[15] NPDES permitting authority remains in the hands of OEPA – pending U.S. EPA approval of ODA's implementation plan for the program.[16] If U.S. EPA grants approval, it would mark the first time in the nation's history that a state agriculture agency gained authority over NPDES permits.[17]

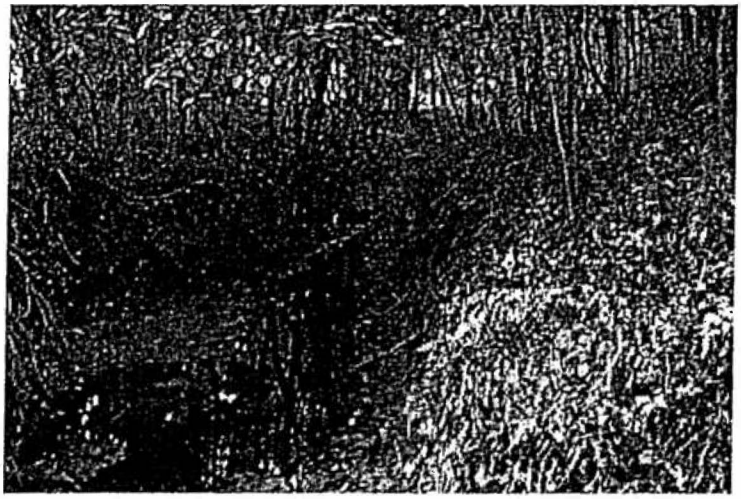
In this report, the Environmental Integrity Project evaluates Ohio's regulation of the livestock industry since the transfer of state permitting authority, with the aim of analyzing ODA and OEPA's enforcement record over the last four years, identifies areas for improvement in Ohio's inter-agency scheme, and considers implications of further delegating authority to ODA to issue NPDES permits.

Outline of Environmental Impacts

The environmental stakes of regulating factory farms match the scale of factory farming operations themselves. According to U.S. EPA, "[i]mproperly managed manure and wastewater from [feeding operations] have been associated with significant environmental and public health concerns, including nutrient over-enrichment of surface water and groundwater, contamination of drinking water supplies and fish kills."[18] In a joint report, U.S. EPA and USDA found that the waste generated by hogs, chicken, and cattle has polluted over 35,000 miles of rivers and has contaminated groundwater in 17 states (out of the 22 states reporting animal waste figures).[19] According to U.S. EPA, "over-enrichment of waters by nutrients (nitrogen and phosphorous) is the biggest overall source of impairment of the nation's rivers and streams, lakes and reservoirs, and estuaries."[20]

In Ohio, CAFOs generate approximately 10,545,271 tons of manure per year, with some individual facilities creating more waste than medium-sized cities.[21] For instance, the manure production at (b)(6) Dairy, a (b)(6) head facility in Hardin County, Ohio approved by ODA in 2005 will be approximately equivalent to human waste production from 95,000 people,[22] exceeding the population of the state's seventh largest city of Youngstown.[23] Unlike human sewage, however, animal waste is not treated before it is released to the environment. Instead, producers store liquid manure in large lagoons or holding tanks,[24] until it is pumped, sprayed, injected, or otherwise applied to the land[25] — often on fields without crops or at times of the year when there is no chance of crop uptake.[26] But as very few facilities control enough land to use up their own manure,[27] the industry favors minimal restrictions on storage and land application in order to expedite disposal of as much waste as possible, whenever and wherever possible.[28] While manure has served an agronomically beneficial purpose for thousands of years, transporting manure even short distances is not practical.[29] Concentrated livestock production therefore leads to concentrated manure production, with few places for the manure to go. The result is that manure may be over-applied or simply dumped on the land where it can easily run off into local rivers and streams, discharge through subsurface drainage tiles, or leach into groundwater.

In excess quantities, phosphorus and nitrogen, nutrients found in manure and fertilizer, stimulate nuisance algae growth and deplete oxygen in water, which can be toxic to fish and aquatic life.[30] Fish kills have been caused by a number of different factory farm related pollution events such as discharge or runoff after land application, spills from lagoons, equipment failures, and purposeful dumping.[31] Fish kills are an obvious indicator of more severe water pollution. In



This three-photo sequence shows the consequences of manure over-application, from ponding in fields, to discharge, to fish kill. Top: Land application field (note manure ponding). Middle: Unnamed tributary of Blues Creek downstream of manure discharge (note stream color). Bottom: Dead fish in Blues Creek.
SOURCE: OEPA NOTICE OF VIOLATION TO (b)(6) HOG FARM (DECEMBER 19, 2003)

many cases, manure spills and pollution from factory farms may not be potent enough to cause a fish kill, but they still result in water quality degradation and harm other aquatic insects and wildlife.

In fact, agriculture is the leading source of water pollution and the leading cause of fish kills in Ohio.[32] Livestock-related incidents account for 72 percent of those fish kills,[33] with Ohio wildlife officials linking the deaths of 330,000 fish to livestock over a 10-year period.[34] Chronic spills from CAFOs and other sources can strip waterbodies of aquatic life, and areas with high concentrations of CAFOs have some of the poorest water quality. For example, the Wabash River, which winds 475 miles through Ohio and Indiana before emptying into the Ohio River near Evansville, is Ohio's "most degraded watershed," according to OEPA, and is "unlikely" ever to support healthy aquatic communities."[35] Linking this environmental degradation to factory farms, studies found the poorest water quality in northern Darke and southern Mercer counties – an area with hundreds of small and medium-sized livestock farms and half of the state's large CAFOs.[36]

In addition to polluting surface waters, CAFOs also threaten underground sources of drinking water, since it is well established that in many agricultural areas shallow groundwater can become contaminated with manure pollutants.[37] Over 800,000 private water wells and approximately 40 percent of public water wells depend on Ohio's groundwater for drinking water, making factory farm contamination a serious public concern.[38] Although glacial tills and other sediments rich in clay were thought in the past to be water-resistant, recent research in Ohio has found cracks, joints, and other pathways called macropores in these deposits that may transport manure contaminants to groundwater.[39]

This contamination poses serious risks to human health. More than 150 pathogens found in livestock manure

are associated with risks to humans, including the six human pathogens that account for more than 90 percent of food and waterborne diseases in humans.[40] Manure-related microbes in water can cause severe gastrointestinal disease, complications and even death.[41] In May 2000 in Walkerton, Ontario, an estimated 2,321 people became ill and seven died after drinking water from a municipal well contaminated with *E.coli* and *Camplyobacter* from runoff resulting from manure spread onto fields by a nearby livestock operation.[42] Manure can also carry arsenic and other toxic metal compounds, as well as antibiotics, into water contributing to antibiotic resistance.[43] Finally, pollution from animal confinements can cause nitrate contamination of drinking water supplies, which can result in significant human health problems including methemoglobinemia in infants ("blue baby syndrome"), spontaneous abortions and increased incidence of stomach and esophageal cancers.[44]

Federal and State Regulatory Landscape

Federal Clean Water Act Permitting Program: NPDES

The Clean Water Act legally defines CAFOs as point sources;[45] therefore, CAFOs cannot discharge pollutants into waters of the United States without an NPDES permit.[46] To be considered a CAFO under federal law, a facility must first be defined as an Animal Feeding Operation ("AFO").[47] An AFO is a lot or facility where the following conditions are met: Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period,[48] and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.[49]

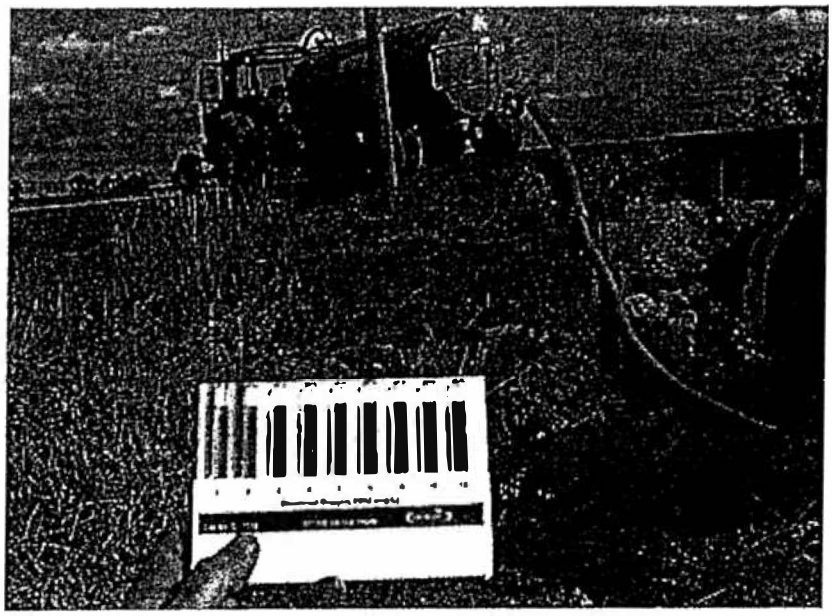
Previous U.S. EPA regulations, dating back to the mid-1970s, defined AFOs as CAFOs if they confined more than 1,000 animal units.[50] Smaller AFOs that confined 300 to 1,000 animal units were also considered CAFOs if they discharged pollutants through a man-made device or if pollutants were discharged to waters that ran through the facility or otherwise came into contact with the confined animals.[51] AFOs were not CAFOs, however, if they discharged in a 25-year, 24-hour storm event.[52] U.S. EPA could designate an AFO as a CAFO, including those with fewer than 300 animal units, if U.S. EPA or an authorized state determined that the AFO was a "significant contributor of pollutants."[53]

U.S. EPA adopted new CWA regulations for CAFOs in February 2003.[54] The new rules contain many of the basic features and structure as the old rule with some important exceptions. First, under these new regulations, Large AFOs, or operations that confine *the equivalent of more than 1,000 animal units* (e.g., 1,000 beef cattle, 2,500 swine over 55 lbs; 700 dairy cattle; 30,000 laying hens, etc.) require permits regardless of whether they only discharge in a large storm event.[55] Second, large poultry operations are covered by the new rules, regardless of what type of waste disposal system they use (dry litter operations were previously exempt).[56] Third, all CAFOs must develop and implement a nutrient management plan to ensure the appropriate agricultural utilization of the nutrients when applying waste to cropland.[57] U.S. EPA determined that these new rule changes, as well as the other requirements, are economically achievable for CAFOs. U.S. EPA's economic analysis shows that this new rule will cause very few CAFOs to experience financial stress.[58]

In *Waterkeeper Alliance v. EPA*,[59] the United States Court of Appeals for the Second Circuit invalidated certain provisions of the 2003 Rule and remanded several other issues back to U.S. EPA for further consideration. Most importantly for this Report, the Second Circuit invalidated the 2003 Rule's requirement that all CAFOs with the "potential to discharge" apply for an NPDES permit.[60] In

August 2006, U.S. EPA issued a proposed rule addressing the issues remanded by the Second Circuit.[61] EPA's 2006 Proposed Rule requires all CAFOs to apply for permits when they "discharge or propose to discharge" pollutants.[62] Thus the proposed regulations cover facilities that discharge and those that are not currently discharging, but will discharge at some time in the future.

In Ohio, OEPA currently issues NPDES permits to CAFOs. Thus, a large or medium sized CAFO that discharges (and under the 2006 Proposed Rule "propose[s] to discharge"), must obtain an NPDES permit with limitations designed to protect the waters of Ohio.



Efforts to pump manure-laden water from tributary, while OEPA inspector conducts field test for dissolved oxygen.
SOURCE: OEPA NOTICE OF VIOLATION TO (b)(6) (b) (JANUARY 14, 2003)

State Operating Permit Program: PTI, PTO, and RCC

Ohio CAFOs may also be subject to state permitting requirements, now implemented by ODA. All feeding operations that confine poultry or livestock equaling 1,000 or more animal units[63] for at least 45 days in a year must apply for a permit to install (PTI) and permit to operate (PTO) prior to constructing or expanding livestock facilities, even if they do not plan to discharge pollutants.[64] Existing facilities of these sizes or larger that have not been permitted must also apply for a permit to operate.[65] Under the terms of the transfer of permit authority, existing facilities with OEPA-issued operating permits – permits issued prior to August 2002 – were required to obtain a Review Compliance Certificate (RCC) from ODA. PTI/PTOs, PTOs, and RCCs are *all* state operating permits administered by ODA. While the primary concern of the NPDES program is protection of water quality, the state operating permit program focuses on facility construction and management.

The state operating permit program and the NPDES permitting program have both distinct and overlapping coverage. The state operating permit program is not as broad as the NPDES permitting program because the state program applies only to large CAFOs. Thus, a medium CAFO that discharges may need an NPDES permit but not a state operating permit, whereas a large CAFO that is purportedly a zero-discharge facility will require a state operating permit but not an NPDES permit. Most large CAFOs, however, will need both an NPDES permit and a state operating permit.

Ohio's Permitting and Enforcement Structure

At the state-government level, three agencies share regulatory authority over livestock operations in Ohio: (1) ODA administers state permits through the Livestock Environmental Permitting Program, which confers authority over construction, modification, and operation of large CAFOs; (2) OEPA administers federal permits through delegation under the Clean Water Act, which confers authority over large and medium CAFOs that discharge to state waters; and (3) Ohio Department of Natural Resources (ODNR) has pollution abatement authority over unpermitted facilities such as small and medium CAFOs, as well as power to seek restitution for fish kills and stream litter. Essentially, no local regulation of CAFOs has existed since Ohio Farm Bureau succeeded in stripping local control over factory farms in 2003.[66] However, Soil and Water Conservation Districts (SWCDs), operating as 88 independent subdivisions of ODNR, investigate pollution incidents on a county level. ODA, OEPA, and ODNR have entered into inter-agency agreements with procedures to notify one another of manure spills and to coordinate with each other and local SWCDs to investigate spills.[67]

ODA

ODA has issued state operating permits to 156 CAFOs.[68] All feeding operations that confine poultry or livestock equaling 1,000 or more animal units[69] for at least 45 days in a year must apply for a permit to install (PTI) and permit to operate (PTO) prior to constructing or expanding livestock facilities, even if they do not plan to discharge pollutants.[70] Existing facilities of these sizes or larger that have not been permitted must also apply for a permit to operate.[71] Under the terms of the transfer of permit authority, existing facilities with OEPA-issued operating permits — permits issued prior to August 2002 — were required to obtain a Review Compliance Certificate (RCC) from ODA.

Livestock Environmental Permitting Program Statistics (as of 6/8/2006)[72]

Total number of permit facilities	156
Number of permit applications in review process	20
Total number of inspections	885
Total number of complaints	390

TABLE 1. ODA-ISSUED PERMITS (AS OF AUGUST 3, 2006)

Year	Review Compliance Certificate	Permit to Operate	Permit to Install/Permit to Operate	Total
2002	0	0	0	0
2003	31	20	15	66
2004	49	5	13	67
2005	1	0	9	10
2006	0	5	4	9
Total	81	30	41	152*

* ODA's list of 156 permitted facilities includes 1 facility with an unknown permit type and 3 facilities with an unknown permit date.

Permitted facilities undergo regular, twice-yearly inspections to ensure compliance with the goal of preventing problems from occurring. Facilities that do not follow the rules, including best management practices, or cause water quality problems, receive notices of violations and may be subject to escalated enforcement actions with penalties. Examples of types of violations include, but are not limited to, operating a facility without proper permits, not following permit requirements as issued, and discharging manure into waters of the state. Enforcement actions for these violations can result in penalties of up to $25,000 per day of violation, depending on the severity, intent and actions taken to mitigate impacts to the environment.[73]

ODA employs a number of steps in "escalated enforcement" in order to secure compliance.[74] Although not codified in statute or regulations ODA's practice is to issue a warning letter to a facility.[75] If the facility does not return to compliance, then the ODA implements the formal enforcement procedures set out in the Ohio statutes and administrative code. The Director issues a notice of deficiencies resulting in noncompliance (NOD), which would include: (1) requirement for compliance; (2) a schedule to return to compliance; and (3) a proposed penalty in the event items (1) and (2) are not followed.[76] Upon re-inspection, if the facility is still not complying, the Director issues a notice of hearing, which is a legal proceeding, with attorneys present, including the Ohio Attorney General's Office representing ODA.[77] At the conclusion of a hearing a final order is issued by the Director, including corrective actions for compliance and payment of a penalty.[78]

In addition, in an emergency, the Director may issue emergency orders, which are effective immediately. If a farm would be unresponsive to an emergency, ODA can perform emergency response to stop any spill.[79]

As of July 31, 2006, ODA had engaged in 155 enforcement actions, consisting of 64 warning letters, 75 notices of deficiency, 10 notices of hearing, 1 emergency order, and 5 final orders.[80] On three occasions, ODA assessed monetary penalties, which were in the amounts of $200, $700, and $5,760.[81]

TABLE 2. ODA ENFORCEMENT BY TYPE OF ACTION AND YEAR (THROUGH JULY 31, 2006)

Year	Warning Letter	Notice of Deficiency	Notice of Hearing	Final Order	Emergency Order	Total
2002	0	1	1	0	0	2
2003	0	5	0	1	0	6
2004	25	20	6	3	0	54
2005	33	32	2	1	1	69
2006	6	17	1	0	0	24
Total	64	75	10	5	1	155*

TABLE 3. ODA ENFORCEMENT BY TYPE OF ACTION AND CATEGORY OF VIOLATION (THROUGH JULY 31, 2006)

Type of Violation	Warning Letter	Notice of Deficiency	Notice of Hearing	Final Order	Emergency Order	Total
Land Application	13	4	0	0	0	17
Manure Storage	19	34	4	3	1	61
Recordkeeping/Testing	29	26	1	0	0	56
Permit/Certificate	9	23	6	2	0	40
Total	70	87	10	4	1	174*

TABLE 4. ODA ENFORCEMENT BY CATEGORY OF VIOLATION AND YEAR (THROUGH JULY 31, 2006)

Year	Land Application	Manure Storage	Recordkeeping/ Testing	Permit/Certificate	Total
2002	0	1	0	1	2
2003	0	4	1	4	9
2004	12	19	8	20	59
2005	5	24	38	11	78
2006	0	13	9	4	26
Total	17	61	56	40	174*

* Because ODA enforcement actions may involve more than one type of violation, the totals in the above charts do not match.

OEPA

Within OEPA's Division of Surface Water, the PTI, Compliance Assistance, and CAFO Unit has two inspectors who use permits, inspections, technical assistance, and enforcement to regulate the compliance of livestock facilities with the Clean Water Act.[82] OEPA administers federal NPDES permits for CAFOs pending transfer of authority to ODA. As part of its NPDES program, OEPA investigates water quality degradation and incidents at livestock facilities involving discharges to "waters of the State." The agency often works with ODNR and local SWCDs

to resolve complaints at unpermitted facilities.

Between October 30, 2001 and June 30, 2005, OEPA engaged in at least 107 enforcement actions, consisting of 96 notices of violation and 11 final orders. Six of these final orders resulted in penalties or settlements, in the amounts of $60,000, $15,000, $10,000, $5,000, $5,715, and $5,000 — or an average penalty of $16,785.[83] OEPA has issued notices of violation for discharges from at least 63 CAFOs,[84] which corresponds fairly closely with the total of 60 facilities that have either applied or been issued NPDES permits.[85] However, the number and timing of final NPDES permits issued — only 1 permit issued prior to 2005 — show that OEPA has failed to keep pace with violators.

TABLE 5. OEPA INSPECTION AND ENFORCEMENT ACTIVITY (10/1/2001–6/30/2005)

Reporting Period*	FY 2002	FY 2003	FY 2004	FY 2005**	Totals
Complaints	182	52	103	80	417
Investigations	155	46	74	78	353
Compliance Inspections	35	73	35	20	163
Notices of Violation	39	13	38	6	96
Enforcement Orders	4	1	3	3	11

* SOURCE: OEPA Annual Summary Reports for FY 2002 to FY 2005, provided to EIP in response to July 28, 2005 public records request.

** Beginning with the 2005 annual report, OEPA switched from a federal fiscal year (October 1-September 30) reporting period to a state fiscal year (July 1-June 30) reporting period.

TABLE 6. OEPA-VERIFIED DISCHARGES FROM ANIMAL FEEDING OPERATIONS (7/26/2000–5/18/2004)

Discharge Source	Manure Storage/ Production Area	Land Application	Other/Unknown	Total
2000	3	2	1	6
2001	6	8	2	16
2002	21	9	3	33
2003	10	14	5	29
2004	1	9	2	12
Total	41	42	13	96

SOURCE: Disk 3 from EIP Records Request, (Microsoft Excel File) "AFOdischarges."

TABLE 7. OEPA-ISSUED NPDES PERMITS

NPDES Permit Status at OEPA	2002	2003	2004	2005	2006	Total
General Permit*	0	0	0	5	7	12
Individual Permit*	1	0	0	6	15	22
Pending Permits (Application Complete) **	0	17	14	5	N/A	36
Total	1	17	14	16	22	60

* List of CAFOs with General and Individual NPDES Permits available at http://www.epa.state.oh.us/dsw/cafo/permit_lists.html (last checked October 13, 2006).

** Source: Data provided by OEPA to EIP in response to July 28, 2005 public records request (Microsoft Excel file), "Melinda's Status on Individual NPDES Permits for CAFOs" as of June 20, 2005.

ODNR

Within ODNR, the Division of Soil and Water Conservation takes the lead in regulating pollution from unpermitted livestock operations. ODNR has power to issue chief's orders for abatement of agriculture pollution at such facilities, but these orders are rare, with only three operations targeted since 2002.[86] The main purpose of these orders is to require compliance with standards developed by the U.S. Department of Agriculture in the "Field Office Technical Guide"[87] and, as applicable, the "Ohio Livestock Manure and Wastewater Management Guide," which are available to all county Soil and Water Conservation Districts (see next section). Chief's orders are backed by imposition of misdemeanor criminal penalties for continued noncompliance. Also within ODNR, the Division of Wildlife may investigate and issue fines for fish kills and degradation of wildlife habitat that result from manure spills.

During the July 31, 2003 to August 1, 2005 period, ODNR received notification of 163 complaints related to livestock operations or cropland applying manure, with reports of at least 10 fish kills.[88] Reflecting Ohio's interagency approach, 9 complaints were referred internally by the Ohio Division of Wildlife, 60 came from SWCDs, 87 from OEPA, and 3 by ODA.[89] ODNR determined in 81 of 147 of those complaints that a violation of ODNR agriculture pollution abatement rules had occurred.[90] Among confirmed violations, at least 37 resulted from land application of manure, with 19 incidents tied to overflow/discharge, 4 to seepage, 15 to rainwater runoff, and 6 to other or unknown wastewater.[91] At least 10 large CAFOs and 36 medium CAFOs committed violations. Nine of these medium dairy CAFOs had 699 cows — exactly one cow below the large CAFO threshold, yet still equivalent to the human waste production of a city of 15,000[92] — and 7 CAFOs had 2,000 or more 55-pound-plus hogs.[93]

SWCDs

The 88 Soil and Water Conservation Districts (SWCDs) in Ohio function as independent subdivisions of ODNR and work on a cooperative basis to encourage responsible manure management practices at unpermitted facilities or on cropland receiving manure transferred from CAFOs.[94] When a recipient landowner takes and land applies CAFO-produced manure, then according to ODA policy, "the local soil and water conservation district is responsible for investigation and enforcement of pollution attributable to land application of manure."[95]

Enforcement by SWCDs is, at best, indirect. By written agreement with the ODNR chief, individual districts may receive and investigate complaints,[96] and district personnel often work closely with ODNR and OEPA inspectors in preparing Pollution Investigation Reports. Where polluters are interested in a voluntary solution, districts offer free technical assistance and cost-sharing grants to polluting landowners of up to $15,000 through the Environmental Quality Incentive Program.[97] The goal is to develop manure management plans at unpermitted operations. Unfortunately, the limitations of this carrot-based approach to environmental protection have been further exacerbated by deep cuts in the state budget for pollution abatement funding, which dropped from $1,500,000 in 2000 to $100,000 in 2006.[98]

Where a polluter is unwilling to cooperate in correcting the problem, SWCDs must send a request to ODNR for a chief's order,[99] a type of enforcement that has occurred on only three circumstances in the last four years.[100]

U.S. EPA

Although the day-to-day NPDES program operation is Ohio's responsibility, the Clean Water Act mandates an oversight function for U.S. EPA to ensure that Ohio's programs are in conformity with federal requirements. Ohio's state NPDES program must be at least as stringent as the requirements imposed by the federal NPDES regulations. U.S. EPA retains the ability to take enforcement actions in authorized states like Ohio when a state fails to act.

In a 2000 petition to U.S. EPA, Neighbors Against Pollution and Citizens for Putnam County for Clean Air and Water alleged OEPA was improperly administering CAFOs. U.S. EPA Region 5 reviewed these allegations in the course of responding to another petition concerning an array of federal environmental programs administered by Ohio filed in 1997 by the Ohio Chapter of the Sierra Club, Ohio Citizen Action, and the Ohio Environmental Council. This petition was denied in 2003. The Region has been working closely with the State to ensure that it fulfills the commitments it made to bring the CAFO permitting program up to speed and which formed the basis for U.S. EPA's denial of the 1997 Sierra Club petition. As described above, OEPA has inspected all large CAFOs, compelled more than 50 CAFO dischargers to apply for permits, and has issued 34 permits.[101]

However, despite improvements by OEPA, in the last three years, U.S. EPA entered enforcement orders against more facilities in Ohio than in any other state, with 17 major facilities in Ohio out of a total of 62 nationwide.[102] Fifteen administrative orders targeted CAFOs sponsored by (b)(6) Dairy Development, which resulted in $1,314,000 in total compliance costs for the facilities.[103] In addition, a judicial order against three facilities controlled by Buckeye Egg Farm/Ohio Fresh Eggs brought an $880,598 penalty and $1.6 million in compliance costs.[104]

Case Studies: The Dirty Half-Dozen

The following facilities illustrate a range of regulatory challenges and failures in Ohio:

1. Ohio Fresh Eggs (Buckeye Egg Farm)

After flouting environmental regulations for nearly two decades beginning in the early 1980s, Buckeye Egg Farm and its owner (b)(6) earned one of the most notorious reputations among the nation's CAFOs.[105] These exploits included numerous pollution incidents, such as a large manure spill into Otter Creek in 1983 that killed 150,000 fish.[106] According to former OEPA Director Chris Jones, Buckeye Egg's "failure to properly manage the large volume of manure generated by its 15.5 million chickens has resulted in severe fly infestation on several separate occasions," citing court documents that described Buckeye Egg's fly problem as reaching "Biblical proportions."[107] Former Attorney General Betty Montgomery called the company "the most recalcitrant corporate polluter" her office had ever seen.[108]

OEPA revoked BEF's operating permits with a May 2002 final order, but ODA had to restart the revocation process after the handover of permitting authority in August 2002. ODA issued a notice of hearing to Buckeye Egg on August 19, 2002 and pulled its permits with a final order on October 15, 2003.[109] Two months later, however, Ohio Fresh Eggs purchased Buckeye Egg Farm facilities, and ODA re-permitted the (b)(6) chicken operation under a new name in December 2003. Ohio Fresh Eggs has subsequently accounted for over half of ODA's complaint investigations, comprising 109 out of a total 210 reports, and over a quarter of ODA's enforcement actions, nearly all of which relate to high manure moisture levels and failure to follow the Insect and Rodent Control Plan — strikingly similar to violations committed when the facility was owned by Pohlmann.

Although ODA's 36 notices of deficiencies threatened penalties as large as $1,131,000 if Ohio Fresh Eggs did not return to compliance,[110] ODA has not levied a single fine against Ohio Fresh Eggs to date. ODA did issue a proposed revocation of Ohio Fresh Eggs's operating permits in September 2005, but that was for Ohio Fresh Eggs's failure to disclose on its permit application the person who would really control new-and-improved management of the facility: (b)(6) (b)(6) blacklisted as a "habitual violator" in Iowa for his "substantial history of [environmental] noncompliance."[111] ODA had turned over the reins of one of the nation's most disreputable CAFOs to one of the nation's most disreputable CAFO owners.

2. Ohio Valley Farms

While ODA "conservatively" estimated the total design capacity of this facility at (b)(6) hogs,[112] *over four times* the threshold requirement for a state operating permit, Ohio Valley Farms has successfully evaded attempts by OEPA and ODA to bring it under a permit since its first documented fish kill in November 2001. ODA issued an NOD to Ohio Valley Farms for operating a CAFO without a permit in May 2004 and another NOD for the same violation in June 2004, but Ohio Valley Farms escaped sanction by promising to divide its operations into separate (b)(6) hog sites ((b) hogs below the PTO threshold).[113] Even this dubious resolution was thwarted when an ODA inspection in February 2005 revealed Ohio Valley Farms had continued operation as a single facility contrary to its pledge. ODA then issued a third NOD for operating without a permit in April 2005.

A new complaint of manure and odor problems at Ohio Valley Farms arrived at OEPA in April 2006, and OEPA referred the complaint to ODA. Despite Ohio Valley Farm's egregious history of noncompliance and broken promises, ODA declined to investigate and re-referred the complaint to ODNR, since Ohio Valley Farms was "not permitted facility."[114] ODNR then turned over the site investigation to the Champaign County SWCD, which determined the following day that it was an odor rather than a pollution problem and that no violation of ODNR rules had therefore occurred. This sequence of events reveal a serious flaw in Ohio's interagency approach to CAFO regulation. A facility defied regulatory attempts by OEPA and ODA for five years, yet investigations fell from ODNR to a local SWCD, the weakest player on the regulatory scene.

Ohio Valley Farms still has no permit and faced no penalty from any agency, yet problems at this factory farm continue. In August 2006, the Ohio Division of Wildlife notified OEPA of discharge/runoff of manure from Ohio Valley Farms into a stream,[115] an environmental violation which should result in immediate imposition of an NPDES permit requirement.

3. (b)(6) Dairy Development

Without question, the largest contributor to Ohio's factory farming boom is (b)(6) (b) Dairy Development, which has sponsored approximately 36 current or proposed dairy operations in Ohio.[116] (b)(6) (b)(6) designs many facilities to house just under 700 cows in order to avoid the state permitting requirement,[117] although the company purportedly reached an informal agreement with ODA Director Fred Dailey to stop this practice.[118] For example, 10 of 15 (b)(6) facilities investigated by U.S. EPA did not have state operating permits, but did have average herd sizes of (b) cows.[119] These strategically undersized facilities then either continue operating under regulatory radar or apply for permit to expand to (b)(6) or more cows after a few years in operation.[120]

(b)(6) sponsored CAFOs have amassed a staggering record of environmental violations in Ohio over the last five years, with at least 48 complaints or reports of manure discharges and approximately 60 enforcement cases.[121] Nineteen different (b)(6) associated facilities have committed violations since 2002: (1) between January 2003 and July 2006, ODA issued 33 enforcement actions against these CAFOs; (2) between January 2002 and January 2005, OEPA issued 21 notices of violations; (3) between 2001 and 2004, Ohio Division of Wildlife linked 15 manure spills to (b)(6) facilities;[122] and (4) in 2004-2005, U.S. EPA issued administrative orders against 15 (b)(6) facilities.[123]

ODA has taken 8 enforcement actions against (b) Dairy alone, including the

largest ODA-levied penalty on record: a $5,760 fine for freeboard violations. Another (b)(6) facility, Nine Mornings Dairy, never obtained a Review Compliance Certificate from ODA despite receiving an NOD and notice of hearing. After racking up a total of 14 manure spills, discharges, and runoffs between May 2002 and September 2004, ODA issued only a warning letter upon discovery of three new violations at Nine Mornings in May 2005. This CAFO has since been sold and renamed as (b)(6) Dairy, and having reduced its dairy herd below the 700-cow permitting threshold, disappeared from ODA's radar screen.

4. (b)(6) Farms

Four years after the transfer of state operating permit authority, ODA is apparently still putting the finishing touches on an RCC for (b) Farms,[124] despite its status as one of the largest dairies in the state with (b)(6) cows (over five times the state permitting threshold) and a repeat violator of ODA rules. OEPA issued a notice of violation to (b) in July 2004 for failure to submit an annual report as required by its original operating permit,[125] but ODA removed this annual reporting requirement after it took over the state program — instead requiring (b) to enter the information into its operating record.[126] (b)(6) has inched up and down the ladder of ODA enforcement options, ever since, going from (1) a warning letter for manure runoff after land application to corn stubble fields in February 2004; to (2) a notice of deficiency in September 2004 for failure to obtain an RCC; to (3) a notice of hearing in November 2004 after ODA proposed to deny (b)(6) application for an RCC; back to (4) a warning letter in January 2005 for insufficient setbacks during a manure application; to (5) a notice of deficiency in March 2005 for over-application of manure; and finally to (6) another warning letter in May 2005 for not following setbacks during a land application.[127]

5. (b)(6) Hog Farm

SWCDs in Miami and Shelby counties failed to abate chronic overflow and runoff problems from manure pits at this unpermitted, medium CAFO designed for (b)(6) hogs, with continuing violations recorded in 2003, 2005, and 2006.[128] A water sample taken five days after a complaint revealed ammonia levels nearly four times greater than the fish kill threshold.[129] Taking the lead at the written request of the SWCDs in May 2005, ODNR issued a chief's order to (b)(6) Farms in June 2006 demanding either closure or a plan to implement best management practices. On a separate track, OEPA issued a notice of violation in May 2005 with a requirement to apply for an NPDES permit, but reported in April 2006 that the operator had completed no corrective action to any adequate degree.[130] No agency has yet assessed a penalty.

6. The UNKNOWN Polluter

Complaint entry logs provided by ODNR and OEPA attribute over 30 manure-related pollution incidents since 2001 to "unknown" sources. These incidents have resulted in at least eight fish kills.

Top: Overflow from egg wash water lagoons.

SOURCE: OEPA NOTICE OF VIOLATION TO SUNNY SIDE FARMS (OCTOBER 8, 2003)

Bottom: Manure storage building, with OEPA inspector noting "ponded contaminated storm water and no containment."

SOURCE: OEPA NOTICE OF VIOLATION TO SUNNY SIDE FARMS (OCTOBER 8, 2003)

Analysis of Ohio Program

The mission statements of ODA and OEPA reveal divergent policy orientations, casting doubt on the wisdom of the current plan to transfer an environmental permitting program to ODA. For ODA, which provides marketing and loan assistance, among other programs, to farmers, "[t]he mission ... is to provide regulatory protection to producers, agribusinesses, and the consuming public; to promote Ohio agricultural products in domestic and international markets; and to educate the citizens of Ohio about our agricultural industry."[131] At the outset, most of ODA's self-described priorities — protecting producers and agribusiness, promoting Ohio agricultural products, using public education on behalf of the agricultural industry — signal potential conflict of interests in regulating environmental violations at livestock operations.

In contrast, OEPA identifies its mission as "protect[ing] the environment and public health by ensuring compliance with environmental laws and demonstrating leadership in environmental stewardship."[132] For OEPA's Division of Surface Water, which currently administers NPDES permitting for CAFOs, the mission is "[t]o protect, enhance and restore all waters of the state for the health, safety and welfare of present and future generations."[133]

ODA has had authority to regulate the livestock industry under its Livestock Environmental Permitting Program and a review of the program's history reveals that ODA has taken a number of positive steps toward more effective regulation of CAFOs, but that the program still has fundamental flaws.

To ODA's credit, state-issued permits exceed federal laws in the areas of siting criteria, geological explorations, water quality monitoring, insect and rodent control plans, and construction specifications.[134] The stand-out feature of the program is frequency of on-site inspections, which are conducted twice a year on a routine basis and as follow-up to reports of violation. ODA reported conducting 885 inspections as of June 2006,[135] nearly six times the annual average of CAFO inspections completed by OEPA over a similar time period.[136]

In addition, ODA's development of the Certified Livestock Manager (CLM) program offers promise. Under the rules, anyone responsible for handling manure at a major Confined Animal Feeding Facility[137] or who transports or applies at least 4.5 tons (dry) or 25 million gallons (liquid) of manure annually must be a CLM or "under supervision" of a CLM who is "reasonably available, but not necessarily physically present."[138] ODA has so far certified 86 persons, who have completed required training and passed an examination.[139] Once certified, these individuals are obligated to attend continuing education classes in order to maintain certification.

But enforcement of the CLM rules is also an example of how ODA's new rules have not lived up to expectations. The agency has issued only two warning letters to manure applicators for operating without a certificate, and neither person paid any penalty or obtained a certificate as a result.[140] And while an ODA inspector promised a CLM-certified manure applicator "would receive a warning letter" for not following setback requirements around a private well in May 2006, the agency has failed to issue any such enforcement against the applicator.[141] Lax enforcement of a laudatory rule effectively nullifies a rule. Another example of this problem is ODA's implementation of the background check requirement, which reviews an applicant's past compliance with federal and state environmental laws. *"[T]he crafters of SB 141 felt a background check would keep 'bad actors' out of Ohio."*[142] However, the discovery, after over two years of operation, that a habitual violator from Iowa had taken over control of Buckeye Egg Farm is a poor, if incomplete, reflection on ODA's competence in background investigations.[143]

EIP has identified the following specific areas in ODA's livestock permitting program that need improvement to protect Ohio's environment and public health. Given a mission that appears at odds with effective environmental enforcement and permitting and the following deficiencies, a transfer of still further environmental protection authority is not warranted.

Program Deficiencies

1. ODA does not deter noncompliance through effective enforcement.

With only three penalties assessed in four years — two in the negligible amounts of $200 and $700 — multi-million dollar operations have little incentive to address problems proactively. Over a similar time period, OEPA assessed double the number of penalties and in amounts averaging $16,786, or more than seven times ODA's average penalty.[144] Even where facilities, such as Ohio Valley Farms, have operated for years in violation of basic legal requirements such as obtaining a permit, ODA has done little to back up the threats it issues near the end of warning letters and notices of deficiency. In 2004, for example, ODA's permit director sent a warning letter to (b)(6) Dairy, noting it was the third enforcement action within a year for failure to maintain adequate freeboard, or overfilling its manure storage pond.[145] "I perceive a pattern of noncompliance that concerns me," wrote the director. "Continued inattention to requirements may well result in more enforcement."[146] Yet later in 2004, ODA staff discovered (b)(6) was using a manure pond that was not authorized for use, and the facility again received only a warning letter. "I trust that you share my concern that these actions contribute to a pattern of noncompliance documented in our records," stated the permit director.[147]

Although difficult to measure, ODA does not seem to take formal, on-the-record enforcement actions, *even in cases where inspectors document CAFOs with repeat violations have broken ODA rules*. For instance, while an ODA inspector found in March 2006 that (b)(6) Dairy had violated land application requirements by spreading unincorporated manure within 125 feet of a residence, instead of the required 300-foot setback, he concluded only that the facility "should be more conscious of the setback requirements, [b]ut after discussing the situations with both parties involved, I feel the situation is resolved without sending any warnings."[148] This recommendation simply does not comport with (b)(6) history as a repeat offender, having garnered 5 previous ODA enforcement actions — including a final order (with penalty) in 2004 for operating without a permit.[149]

The problem of lax enforcement may only be exacerbated in the future. Due to

the timing of the handover of state permit authority in 2002, permit renewals will spike in 2008-2009, a two-year period in which ODA will likely have to review seven or eight times the number of permits that it annually reviewed during the preceding three-year period. To the extent that 2008–2009 coincides with ODA's assumption of NPDES permitting authority, the quality of both permit review and enforcement, on both state and federal fronts, could significantly deteriorate as ODA's attention is distracted and its resources strained. For example, in the first 17 months after assuming state permit authority, ODA issued only eight enforcement actions, two of which originated with OEPA's revocation of Buckeye Egg Farm's permits. A similar lull in enforcement activity would pose far graver risks the next time around, given the increased number of facilities (a greater potential for harm) and removal of OEPA's remaining authority over CAFOs (a weakened safety net).

2. ODA fails to effectively regulate manure transfer from permitted farms.

ODA authorizes CAFOs to transfer manure for land application manure off-farm (also known as distribution and utilization).[150] Eleven of the 12 most recently permitted CAFOs plan to use distribution and utilization for their manure.

If an ODA permitted facility employs distribution and utilization, the CAFO simply provides the recipient with an analysis of the nutrient content of the manure and copies of technical requirements on how to apply manure in accordance with ODA rules and obtains a signed acknowledgment from the recipient that it has received this information and will use best management practices.[151] If the permitted facility retains control over the land application of the manure, it may be liable for subsequent spills and discharges.[152] Commonly, however, the permitted facility simply sells the manure to a manure broker, thus washing its hands of the often dirty business of land application and responsibility for environmental impacts. Although this practice is allowed by federal Clean Water Act regulations, ODA could have closed this loophole through state regulations. Instead, the practice is increasingly common. Worse still, as the number of manure transfers increases, ODA has diminished its own oversight capability, evidenced by its decision to eliminate manure bills of sale from CAFOs' operating record.[153]

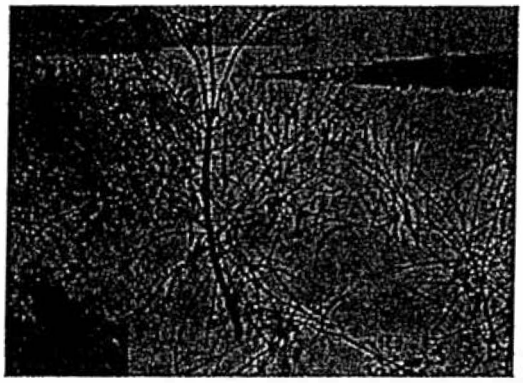
Because of the potential environmental and public health impacts of the manure transfer loophole, it is especially critical that the public have access to information on potential land application of transferred manure. However, ODA's actions in three recent permit proceedings indicate a resistance to disclosing crucial information necessary for public participation. During the public comment period for (b)(6) Diary, (b)(6) Dairy, and (b)(6) Dairy, ODA refused requests to make land application maps available to the public due to purported trade secrecy issues.[154] ODA eventually reversed its trade secrecy determination,[155] but before it could disclose the maps, the dairies sued ODA in Ohio state court.[156] The dairies recently dismissed that lawsuit,

Another example of ponded liquid manure after over-application. "The substrate of this entire tributary had grey growth (sewage fungus) that is indicative of chronic impairment."
SOURCE: OEPA NOTICE OF VIOLATION TO (b)(6) HOG FARM (JANUARY 27, 2004)

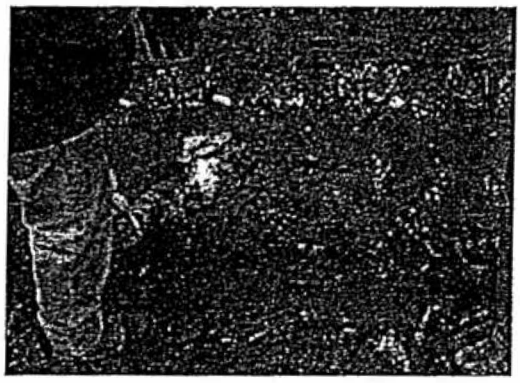
after concerned neighbors intervened in the lawsuit, and ODA now must make the land application maps available to the public.[157] However, ODA refused to extend the public comment periods until the public could review the maps, which eviscerates effective public participation. ODA has also decided not to request land application maps from future permit applicants who employ distribution and utilization.[158]

Other issues surrounding manure transfer demand more sunlight. For instance, while ODA rules require application only on land with available water holding capacity in order to avoid application and discharge from saturated land, an operator of a (b)(6) facility disclosed to U.S. EPA that his "agreement with the crop farmer states that the crop farmer must take his manure even if the ground is too wet to apply it."[159]

Finally, "[i]f a recipient landowner takes and land applies the manure and is not large enough for ODA jurisdiction, then the local [SWCD] is responsible for investigation and enforcement of pollution attributable to land application of manure."[160] Under this division of labor, SWCDs are supposed to monitor disposal[161] of what appears to be upwards of 90 percent of manure produced ODA-permitted CAFOs but distributed to non-permitted facilities for land application.[162] This task is all the more impossible for SWCDs given ODA's new policy of not requesting land application maps as part of manure management plans.[163] "If a recipient landowner takes and land applies the manure and is not large enough for ODA jurisdiction, then the local [SWCD] is responsible for investigation and enforcement of pollution attributable to land application of manure."[164] Even under ideal conditions, SWCDs are ill-suited to implement effective, uniform environmental regulation because they have no penalty authority and depend solely on the voluntary cooperation of polluters, which is tantamount to non-regulation.



Manure applied during winter within 50 feet of a stream, although rules require a minimum 200-foot setback.
SOURCE: ODA, SC'S FARM COMPLAINT INVESTIGATION REPORT (FEBRUARY 4, 2005)



ODA inspector notes approximately a quarter-inch of manure applied on top of snow cover.
SOURCE: ODA, SC'S FARM COMPLAINT INVESTIGATION REPORT (FEBRUARY 4, 2005)

3. ODA places inadequate restrictions on winter manure applications.

The record of wintertime applications of manure on frozen or snow-covered ground is another example of a weakness in ODA's program. Winter manure application is permitted within ODA rules "only if absolutely necessary and only under numerous restrictions," and applicators must obtain prior approval from ODA.[165] Yet where ODA has been aggressive in enforcement, such as the flurry of notices sent out for inadequate freeboard in winter 2003 or strict rules adopted to restrict wintertime application to emergency disposal, the absence of any restrictions on wintertime transfer of manure negates many of ODA's efforts. Manure applied in winter serves no agronomic purpose. There is no chance of crop uptake, and manure on frozen or snow-covered ground is prone to runoff upon thaw. ODA's warning letter to the

perpetually noncompliant Ohio Fresh Eggs — suggesting "while you are not responsible for these violations" that the facility should apprise manure recipients of winter application rules — illustrates the shortcomings of unenforceable promises.[166] As ODNR stated in a newsletter for soil and water conservation districts, "Protecting water quality would be a lot easier if farmers never needed to apply manure when fields are frozen or covered with snow."[167]

4. ODA has reduced permit coverage and reporting requirements.

One danger in transferring NPDES authority to ODA is that the universe of permitted facilities may contract in size, just as occurred during the transfer of state permitting authority.[168] ODA and OEPA records reveal a significant disparity in the number of state permits handed over in 2002. At the time of transfer, OEPA reported passing oversight of 144 permitted facilities to ODA,[169] while ODA reported that OEPA had 125 permitted livestock operations.[170] A further disparity is that of 156 ODA-issued permits, only 109 appear to be RCCs (84), PTOs (15), or PTI/PTOs (10) for formerly permitted facilities.[171] Therefore, up to 35 facilities — or a quarter (24.3 percent) of original OEPA-permitted factory farms — fell off the regulatory radar with the transfer of state permitting authority. ODA declined to account fully for these "missing" facilities, so there is no definitive explanation for how or why such a drop-off in regulated population occurred. Records show some of these facilities continue to operate in violation of permitting requirements.[172]

In addition to the unexplained dropoff in permitted facilities, there are other indications that the 2002 authority transfer to ODA left the public less protected. For example, although ODA rules require facilities to submit a written report to the agency within five days of any manure spill,[173] ODA has not been vigilant in enforcing this reporting requirement. ODA has stated that it does not track or keep a list of such reports.[174] The record indicates that ODA has simply not enforced the reporting requirement. ODA estimated that it had received approximately 5 written reports,[175] but complaint investigations by ODA inspectors reveal at least 20 incidents involving manure spills or discharges at ODA-permitted facilities.[176] And there is no record of any ODA enforcement action against a facility for failure to submit a written report.

Furthermore, while OEPA included an annual reporting requirement for the first three years of newly issued PTIs, ODA limits annual reporting requirement only to NPDES permits.[177] OEPA viewed this three-year annual reporting period as a key means to make sure that the assumptions underlying a particular facility's design turned out to be correct.[178] ODA still requires CAFOs to place the annual reporting information in their operating record, but this information is kept on-site at facilities and is far less accessible to ODA permit-writers and concerned citizens.

Recommendations

Given the urgent need for effective permitting and enforcement for CAFOs, EIP recommends the following improvements to ODA's program before considering any transfer of further authority to ODA.

Accelerate, streamline, and toughen up enforcement.

The record of enforcement against recalcitrant polluters shows an unacceptable lag of time between violations and compliance, and too much reluctance on ODA's part to engage in formal enforcement actions. ODA should eliminate warning letters and off-the-record notices altogether as steps in the enforcement process. While cooperation between livestock producers and regulators can facilitate compliance, the rules require ODA to issue an NOD after an inspection report indicates a violation. Further, there are so few instances of actual penalties being levied – only 3 final orders with penalties in four years – and such slow escalation in enforcement that facilities are far likelier to opt for the economic benefits of either long-delayed compliance or outright noncompliance. Without the "stick," or the credible threat of escalation and penalty, compliance is left to the honor system. ODA must demonstrate with greater conviction that it takes its responsibilities as a protector of the environment seriously.

Close manure transfer loophole by establishing producer-based liability.

For transferred manure, ODA should adopt a policy presumption that clearly assigns liability for discharges and spills to manure producers. ODA's case-by-case approach to assigning responsibility for pollution incidents maximizes the incentive for producers to shell-game waste, drawing in third parties wherever possible in order to dilute the producers' own exposure to liability. The more parties involved, the less likely any one party will be held responsible. ODA's approach also minimizes the incentive for responsible producers to take an active role in monitoring where waste goes and how it is applied, since greater oversight indicates greater control and results in greater likelihood of liability. OEPA has noted the difficulty in determining responsibility and liability for manure once it leaves a CAFO due to use of "numerous methods and contracts."[179]

ODA policy should foster the centralized and transparent transfer of manure, and ODA resources should not be diverted with every pollution incident into playing referee in a blame game. Other states, such as Wisconsin offer Ohio a more appropriate model of producer-based liability. For example, the Wisconsin Department of Natural Resources (WDNR) holds producers liable for all manure discharges and spills, including spills of manure land applied by a third

party. In order for a producer to transfer liability, they must obtain written approval from WDNR, and only may do so in enumerated circumstances.[180]

Bring medium CAFOs under state operating permits.

To supplement ODNR regulation of unpermitted CAFOs, ODA should work to bring more existing facilities under state operating permits. A pragmatic policy could leave existing permitting thresholds in place as a baseline requirement, while imposing a new requirement on medium CAFOs to obtain state operating permits if they violate best management practices as established under Ohio's agricultural pollution abatement rules.[181] This requirement would parallel federal rules that place NPDES permit requirements on medium CAFOs that discharge to state waters. Since few unpermitted facilities wish to face the permit review and application process, a violation-based permit requirement would motivate more facilities to comply with best management practices. ODA could then focus on the medium-sized operations most deserving of its attention and bring an end to the cat-and-mouse game of manipulating facility sizes as a means of avoiding inspection and enforcement.

Require annual reports for ALL facilities.

The annual reporting requirement under NPDES should extend to all permitted facilities and all certified manure brokers. When an SWCD or any other state agency receives a location-based report of a manure discharge, an investigator should have immediate access to a master map that identifies any nearby fields that receive manure, the brokers who apply it, and the facilities that produce it. At the very least, OEPA's three-year reporting requirement for new facilities should be re-implemented. More reports will also create more information on appropriate design standards and changes to future rules. As an initial step, ODA must begin enforcing its own manure spill reporting requirement and follow the lead of OEPA and ODNR in tracking known pollution incidents in an ODA-specific database. The current absence of such a list at ODA is unacceptable. The agency should have ready access not only to information about where manure is produced, but to where it is going and where it has most often caused environmental problems.

Restrict wintertime manure transfers.

Restrictions on wintertime application of manure must by definition extend to wintertime distribution and utilization of manure. Distribution and utilization is a code phrase for land application at fields not under a permitted facility's control. It is a self-defeating exercise for ODA to place restrictions on manure application to frozen or snow-covered ground while placing no restrictions on the amount of manure that facilities can transfer during winter months. Indeed, ODA's relatively aggressive enforcement of freeboard violations in the winter may often have the unintended consequence of increasing winter applications by third-party brokers or applicators. Oversight of manure brokers is minimal. They sign an agreement with the manure-producing facility promising to use best management practices, without facing any enforceable permit terms.

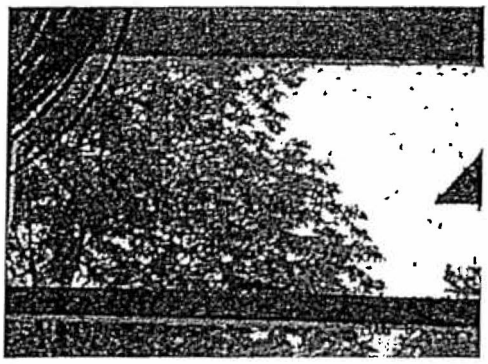
Hone inter-agency tools.

State agencies should develop a common database to log complaints, compile environmental violations, and track compliance at CAFOs. In addition, for every manure-related entry in the common

database, agencies should identify the original source facility producing the manure — whether or not the agency has determined that the source facility is "at fault." Tracking manure-related incidents on a source-facility basis will enable speedy, targeted investigations of repeat violators. A more definitive inventory of existing AFOs needs to be taken in Ohio. State officials estimate the total number of AFOs at 25,000 to 30,000,[182] but these "ballpark" figures do not shed light on how many existing facilities may be operating above permitting thresholds. The absence of accurate information on the universe of unpermitted livestock operations deprives both regulatory agencies and the public of a key measuring stick to assess the effectiveness and true scope of coverage of the state and federal permitting programs.

Learn from past missteps.

Prior to any final transfer of NPDES permitting authority, ODA and OEPA should prepare comprehensive reports to identify problems that occurred during the state-permit handover in 2002. While EIP has found certain areas of weakness and raised questions about this transfer, the affected state officials and state agencies are in a better position to apply these lessons to any further transfer of authority.



Fly infestation inside a home located near livestock operation. SOURCE: ODA, (b)(6) CATTLE COMPLAINT INVESTIGATION REPORT (MAY 31, 2006)

Report to citizens.

The unavailability of this basic enforcement and compliance information has broad implications. Public access is critical because it allows citizens to make informed decisions regarding environmental issues that affect their communities. Citizens also need compliance data in order to assist U.S. EPA and the states in ensuring that environmental violations are resolved. Moreover, the public's direct access to compliance information provides incentives for regulated entities to comply with the law.

Finally, providing information on the internet will free up more resources for core permitting and enforcement activities. ODA should post key enforcement information on its website, and all agencies should post their CAFO databases related to discharges on their website.

NOTES

1 According to the U.S. Department of Agriculture (USDA) report, "Manure Nutrients Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients: Spatial and Temporal Trends for the United States" (December 2000) p. ii, available at http://www.nrcs.usda.gov/technical/land/pubs/manntr.html: "[T]he structure of animal agriculture has changed dramatically over the last two decades. Small and medium-sized livestock operations have been replaced by large operations at a steady rate. The total number of livestock has remained relatively unchanged, but more livestock are kept in confinement. The number of confined animals per operation has increased for all major livestock types."

2 USDA Agriculture Research Service, "National Program 206: Manure and Byproduct Utilization Action Plan" (2005), p.1, available at http://www.ars.usda.gov/SP2UserFiles/Program/206/206ActionPlan2004/NP206ActionPlanOctober2004Revisedwosynames.pdf.

3 See "Outline of Environmental Impacts" in Part I, below.

4 The Animal Feeding Operation (AFO) industry is big business. The poultry industry alone generated over $21 billion in on-farm revenue in 1997, with much of the production coming from corporate producers operating large AFOs. EPA, Development Document for the Final Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, EPA-821-R-03-001 at 4-35 (2002) ("Development Document"), available at http://cfpub2.epa.gov/npdes/afo/cafodocs.cfm. Similarly, the swine industry generates roughly $10 billion per year at the production level; revenue from consumer sales often exceeds $20 billion. Development Document at 4-2. Large agribusinesses realize the lion's share of the profits. For instance, Tyson Foods, the world's largest meat producer, enjoyed $26.4 billion in sales and realized $1.9 billion in gross profits in 2004. Tyson, Annual Report 2004, available at http://media.corporate-ir.net/media_files/irol/65/65476/reports/ar04.pdf. Smithfield Foods, the nation's largest hog producer, generated $9.3 billion in sales and $227 million in net income in the same year. Revenues and profits continue to grow each year. Smithfield, Annual Report 2004, available at http://www.rkconline.net/AR/SmithfieldAR2004/.

5 See, e.g., Congress Daily, "Republicans Aim to Block EPA Regulations on Manure" (July 10, 2006) (mentioning that the American Farm Bureau, Tyson Foods and other livestock, poultry and dairy companies have hired the Livingston Group to lobby Congress in support of legislation that would exempt CAFOs from hazardous waste laws); Letter from Saxby Chambliss, Chairman of the Senate Committee on Agriculture, Nutrition and Forestry and James Inhofe, Chairman of the Senate Committee on Environment and Public Works to Stephen Johnson, Administrator of U.S.EPA (March 3, 2006) (implying that five of the six states in Region 5 have Clean Water Act requirements for CAFOs that are more stringent than the Act allows, and requesting that EPA Headquarters "clarify" the law for the Regions and states); Des Moines Register, "What about property rights for hog lots' neighbors?" (July 26, 2006) ("[L]egislators voted for laws that prevent Iowans from having a say in decisions made hundreds of times a year by neighbors and corporations to build large-scale confined animal feeding operations (CAFOs) near their properties."); see also Dayton Daily News, "Ohio Farm Bureau Keeps Agribusiness at Forefront, (December, 2, 2002), available at http://www.daytondailynews.com/project/content/project/farm/1202farmbureau.html (quoting Columbus-based attorney Rick Sahli's view that "Farm Bureau uses its clout to keep farm regulations to a minimum.").

6 Dayton Daily News, "Lucrative Megafarm Market Lures Europeans" (December 6, 2002), available at http://www.daytondailynews.com/project/content/project/farm/1206future.html.

7 Id.

8 USDA, 2002 Census of Agriculture, available at http://www.nass.usda.gov/census/census02/volume1/oh/st39_1_001_001.pdf.

9 USDA, "Manure Nutrients Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients: Spatial and Temporal Trends for the United States" (December 2000), available at http://www.nrcs.usda.gov/technical/land/pubs/manntr.html.

10 Nationally, a Cornell University study projects that the number of dairy farms will decline from over 105,000 in 2000 to about 15,000 in 2020, with 84.6 percent of farms containing 500 or more cows, as cited in the dairy trade newsletter New World News (January/February 2004), available at http://www.vrebahoff.com/HTML/Newsletter_0401.pdf.

11 See Dayton Daily News, "The Supersizing of America's Livestock Farms" (December 1, 2002), available at http://www.daytondailynews.com/project/content/project/farm/1201overview.html. ("The Ohio Farm Bureau, the lobbying voice of agriculture and a generous contributor to state candidates, pushed hard for the bill [that transferred permitting authority to ODA]. 'It was something that was extremely important to us and perhaps was one of the most important bills that we've worked on,' Farm Bureau lobbyist Larry Gearhardt said. 'We spent a tremendous amount of time trying to massage the bill and have it drafted the way it should be to run a good program.'").

12 Ohio Governor Bob Taft signed permitting authority transfer into law ("SB 141") on December 14, 2000. S.B. 141, 123rd Gen. Assem., (Ohio 2000). In addition to transferring state and federal permitting authority from

OEPA to ODA, the bill created extensive, new regulations for CAFOs and appropriated $1.7 million to fund the Livestock Environmental Permitting Program.

[13] Although the 1,000 animal unit measure is used in this report as shorthand, U.S. EPA and Ohio adopted animal-specific thresholds with the release of new rules form the Clean Water Act in 2002. The term "animal unit" is no longer officially used for permitting thresholds. 2003 CAFO Rule, 68 Fed. Reg. 7176 (February 12, 2003). One thousand animal units is equivalent to 700 mature dairy cows; 1,000 beef cattle or heifers; 2,500 swine weighing more than 55 lbs.; 10,000 swine weighing less than 55 lbs.; 30,000 ducks (other than liquid manure systems); 5,000 ducks (liquid manure handling systems); 30,000 chickens (liquid manure handling systems); 125,000 chickens except layers (other than a liquid manure system); 82,000 laying hens (other than liquid manure systems); 1,000 veal calves; 500 horses; 10,000 sheep or lambs; or 55,000 turkeys. See large CAFO definition under U.S. EPA's NPDES glossary at http://cfpub.epa.gov/npdes/glossary.cfm#L.

[14] The Clean Water Act prohibits the "discharge of any pollutant" except in compliance with specific provisions of the Act. Federal Water Pollution Control Act, 33 U.S.C. § 1311(a). In particular, the discharge of any pollutant into navigable waters is illegal unless authorized by a permit issued pursuant to section 402 of the Act. Id. § 1342. Section 402 established the NPDES permit program, and requires dischargers to obtain a permit from EPA or an authorized State. Id. § 1342(a)(1), (b). NPDES permits prohibit or limit the amount of pollutants that may be discharged to waters and contain monitoring and reporting requirements, as well as other provisions necessary to ensure that discharges do not harm water quality or human health.

[15] On August 19, 2002, ODA finalized the Livestock Environmental Permitting Program, as required under ORC § 903.02(A)(1) and ORC § 903.03(A)(1), and assumed enforcement authority over 161 permits to install formerly issued by Ohio EPA.

[16] Submission of ODA's implementation plan to U.S. EPA appears imminent, as Kevin Elder, Livestock Environmental Permitting Program Executive Director, recently reported that "[t]he delegation document is almost complete and has been sent to the [Ohio Attorney General]'s office for review." Approved minutes from Concentrated Animal Feeding Facility Advisory Committee (June 8, 2006), available at http://www.ohioagriculture.gov/pubs/divs/lepp/curr/mtgs/documents/Minutes-approved.6-08-06.pdf.

[17] In 2001, a second state, Oregon, also passed legislation to transfer the authority to administer the CAFO portion of its NPDES program to the Oregon Department of Agriculture. See "Oregon Department of Environmental Quality NPDES Program Review (January 12, 2005), p.14, available at http://yosemite.epa.gov/r10/homepage.nsf/d7b03c22cbc084358825646400 6a2ff4/b0c3582d387d4b1f882564c800026f1c/$FILE/OR%20NPDES%20Report%20Final%202005.pdf. According to U.S. EPA Region 10, however, Oregon has not formally applied for, nor has EPA granted, an NPDES program revision (per 40 CFR § 123.62) reflecting a transfer of NPDES authority to the Oregon Dept. of Agriculture. (Email correspondence to EIP from U.S. EPA Region 10 (October 10, 2006)).

[18] Statement from U.S. EPA National Agriculture Compliance Assistance Center on best management practices, available at http://www.epa.gov/oecaagct/anafobmp.html.

[19] U.S. EPA and USDA, section 2.2 of "Draft Unified National Strategy for Animal Feeding Operation" (September 11, 1998), available at http://water.usgs.gov/owq/cleanwater/afo/.

[20] U.S. EPA and USDA, "Clean Water Action Plan: Restoring and Protecting America's Waters", at 56 (February 1998), available at http://water.usgs.gov/owq/cleanwater/action/cwap.pdf.

[21] Ohio Environmental Council, "CAFO Factsheet," available at http://www.theoec.org/pdfs/ffarms/ffarms_tools_fsheets_cafofsheet.pdf or http://72.14.209.104/search?q=cache:tv6hFmzOK94J:www.theoec.org/pdfs/ffarms/ffarms_tools_fsheets_cafofsheet.pdf+ohio+environmental+council+cafo+fact+sheet&hl=en&gl=us&ct=clnk&cd=1.

[22] One dairy cow produces 21 times more waste than an average human. "The Meatrix," produced by GRACE Factory Farm Project, available at http://www.themeatrix.com/learnmore/waste.html ("This figure was calculated using dairy and human waste characteristics reported in the USDA's Agricultural Waste Management Field Handbook (1992) ... assuming an average lactating dairy cow weight of 1,400 lbs., and an average human weight of 175.8 lbs. ... Weight of waste excreted by lactating dairy cow: 80.00 lbs./day/1,000 lbs. of live weight.a (Weight of waste excreted by a 1,400 lb. lactating dairy cow: 112.0 lbs./day.) Weight of waste excreted by human: 30.00 lbs./day/1,000 lbs. of live weight.a (Weight of waste excreted by a 175.8 lb. human: 5.274 lbs./day.) Thus a 1,400 lb. lactating cow excretes 21.24 times as much waste per day as a 175.8 lb. human.)").

[23] Ohio – City Population, available at http://www.citypopulation.de/USA-Ohio.html.

[24] E.g., (b)(6) Dairy will have two 22.5 million gallon earthen manure lagoons to contain an estimated 47 million gallons of annual liquid manure production. ODA factsheet available at http://www.ohioagriculture.gov/lepp/curr/drft/lepp-dp(b)(6) factsh-111204.stm.

[25] Land application is the primary method of waste disposal with roughly 90 percent of all CAFO-generated waste being applied onto fields. U.S. EPA, State Compendium; Programs and Regulatory Activities Related to Animal Feeding Operations at 13 (May 2002), available at http://www.ars.usda.gov/sp2UserFiles/Place/19020500/PhosphorousImages/compendium.pdf.

[26] Winter applications of manure, for example, serve no agronomic benefit to soils, but are routinely used as a waste disposal method by livestock operations to mitigate overflows in lagoons or storage pits. See, e.g., ODNR, "Winter Weather Complicates Manure Application," link available at http://www.dnr.ohio.gov/soilandwater/swcds/swcdresources.htm ("Protecting water quality would be a lot easier if farmers never needed to apply manure when fields are frozen or covered with snow. But the fact is, some farmers don't have enough storage capacity to get through the winter. Sometimes, even farmers with storage facilities need to apply manure in the winter because wet fall weather or other problems delayed application. Unfortunately, uncooperative winter weather can lead to pollution, even for farmers who follow winter manure application guidelines. Last winter, for example, a quick thaw led to a rash of pollution complaints in early March. Manure applied earlier in the winter had remained frozen on fields for weeks or even months, but after the thaw surface flow carried it into streams.... Although some other states have prohibited manure application to frozen or snow-covered ground, it's still permitted under very careful management in Ohio.").

[27] Of the 12 facilities most recently issued final permits by ODA, only one indicated in its draft or final permit notice that it would apply waste manure exclusively to its own land. ODA, Livestock Environmental Permitting Program, "Recent Final Permits", available at http://www.ohioagriculture.gov/lepp/lepp-recent.stm.

[28] Bill Weida, formerly an economics professor at Colorado College, has noted: "[P]ollution shopping companies [such as CAFOs] ... look for counties or regions where the permitting of potentially polluting activities is easiest and where environmental laws are seldom or loosely enforced." "Pollution Shopping in Rural America: The myth of economic development in isolated regions" (November 16, 2001), available at http://factoryfarm.org/docs/Pollution_Shopping_Update.pdf.

[29] USDA Agriculture Research Service, "National Program 206: Manure and Byproduct Utilization Action Plan" (2005), p. 1 ("Transportation costs inhibit distribution of manure at sites distant from where it is generated. Most manure, therefore, is usually land-applied within about 10 miles of beef cattle feedlots, dairy barns, poultry houses, or swine facilities."), available at http://www.ars.usda.gov/SP2UserFiles/Program/206/206ActionPlan2004/NP206ActionPlanOctober2004Revisedwosynames.pdf; USDA, "Manure Nutrients Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients: Spatial and Temporal Trends for the United States", p. 1 (December 2000) ("With fewer, but larger operations, the amount of animal manure has become more concentrated in local areas. Because the distance that manure can be hauled for land application has practical limits, manure loadings per acre must either increase or alternative methods of utilization be adopted."), available at http://www.nrcs.usda.gov/technical/land/pubs/manntr.html.

[30] U.S. EPA has identified the pollutants in CAFO waste as: "nutrients (particularly nitrogen and phosphorus), organic matter, solids, pathogens, and odorous/volatile compounds. Animal waste is also a source of salts and trace elements and, to a lesser extent, antibiotics, pesticides, and hormones....." 2003 CAFO Rule, 68 Fed. Reg. 7176, 7235 (Feb. 12, 2003).

[31] 2003 CAFO Rule, 68 Fed. Reg. at 7236-37 ("Runoff of animal wastes is more likely when rainfall occurs soon after application (particularly if the manure was not injected or incorporated) and when manure is overapplied or misapplied. ... Dry weather discharges to surface waters associated with CAFOs have been reported to occur through spills or other accidental discharges from lagoons and irrigation systems, or through intentional releases.").

[32] See figures 1 and 2 in Ohio Environmental Council, "Dead in the Water: A Comprehensive Analysis of Fish Kills in Ohio" (December 2003), p. 7 ("Livestock agricultural related incidents, including manure lagoon overflow, the misapplication of manure on land, cattle wading in streams and other manure incidents account for 72% of all agricultural sources of fish kills.").

[33] *Id.*

[34] Dayton Daily News, "The Supersizing of America's Livestock Farms" (December 1, 2002), available at http://www.daytondailynews.com/project/content/project/farm/1201overview.html.

[35] Ohio EPA tested for fish quality, bacteria and other contaminants during 18 months in 1999 and 2000. Information available at http://www.epa.state.oh.us/dsw/documents/wabash2001_infographic.pdf.

[36] Dayton Daily News, "The Supersizing of America's Livestock Farms" (December 1, 2002), available at http://www.daytondailynews.com/project/content/project/farm/1201overview.html.

[37] 2003 CAFO Rule, 68 Fed. Reg. at 7237 ("[Groundwater contamination] occurs as a result of water traveling through the soil to the ground water and taking with it pollutants such as nitrate from livestock and poultry wastes on the surface. Leaking lagoons are also a potential source of manure pollutants in ground water, based on findings reported in the scientific and technical literature.").

[38] Ohio Environmental Council, "CAFO Factsheet," available at http://www.theoec.org/pdfs/ffarms/ffarms_tools_fsheets_cafofsheet.pdf or http://72.14.209.104/search?q=cache:tv6hFmzOK94J:www.theoec.org/pdfs/ffarms/ffarms_tools_fsheets_cafofsheet.pdf+ohio+environmental+council+cafo+fact+sheet&hl=en&gl=us&ct=clnk&cd=1.

[39] *Id.*

[40] 2003 CAFO Rule, 68 Fed. Reg. at 7236 ("These organisms are: *Campylobacter spp., Salmonella spp.* (non-typhoid), *Listeria monocytogenes, Escherichia coli* O157:H7, *Cryptosporidium parvum, and Giardia lamblia*. All of these organisms may be rapidly transmitted from one animal to another in CAFO settings. An important feature relating to the potential for disease transmission for each of these organisms is the relatively low infectious dose in humans. The protozoan species *Cryptosporidium parvum* and *Giardia lamblia* are frequently found in animal manure. Bacteria such as *Escherichia coli* O157:H7 and Salmonella spp. are also often found in livestock manure and have been associated with waterborne disease. The bacteria *Listeria monocytogenes* is ubiquitous in nature and is commonly found in the intestines of wild and domestic animals.").

[41] David Wallinga, M.D., Institute for Agriculture and Trade Policy, "Concentrated Animal Feeding Operations: Health Risks from Water Pollution", (November 2004), available at http://www.iatp.org/iatp/publications.cfm?accountID=421&refID=37390.

[42] Id.

[43] Id.; see e.g., Chapin, et al., "Airborne Multidrug-Resistant Bacteria Isolated from a Concentrated Swine Feeding Operation", 113 Environmental Health Perspectives 137 (February 2005), available at http://www.ehponline.org/members/2004/7473/7473.pdf.

[44] 2003 CAFO Rule, 68 Fed. Reg. at 7238. See also U.S. EPA, Office of Children's Health Protection, "Drinking Water Contaminants – America's Children and the Environment: A First View of Available Measures", available at http://yosemite.epa.gov/ochp/ochpweb.nsf/content/drinking_water_contam.htm; Centers for Disease Control and Prevention, "Spontaneous Abortions Possibly Related to Ingestion of Nitrate-Contaminated Well Water—La Grange County, Indiana 1991–1994", Morbidity and Mortality Weekly, Report 45 (26) (1996), at 569-571 (linking high nitrate levels in Indiana well water near confinement operations to spontaneous abortions in humans), available at http://www.cdc.gov/mmwr/PDF/wk/mm4526.pdf.

[45] 33 U.S.C. § 502(14).

[46] Id. § 402(a).

[47] 40 C.F.R. § 122.23(b)(2).

[48] Id. § 122.23(b)(1)(i).

[49] Id. § 122.23(b)(1)(ii).

[50] Id. § 122.23(b)(3).

[51] Id. § 122.23(c)(2).

[52] Id. § 122.23(b)(3).

[53] Id. § 122.23(b)(3).

[54] 2003 CAFO Rule, 68 Fed. Reg. at 7176.

[55] 40 C.F.R. § 122.23(b)(4).

[56] Id.

[57] Id. § 122.42(e).

[58] 2003 CAFO Rule, 68 Fed. Reg. at 7246-47. EPA estimates that approximately 3 percent of all Large CAFOs and about 4 percent of all affected small business CAFOs nationwide may be vulnerable to closure.

[59] 399 F.3d 486 (2d Cir. 2005).

[60] Id. at 505–06

[61] U.S. EPA, Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision; Proposed Rule, 71 Fed. Reg. 37744, 37774 (2006).

[62] 40 C.F.R. § 122.21(a).

[63] See explanation of animal unit in note 13, above.

[64] Ohio Rev. Code Ann. § 903.02(A)(2); 903(A)(3); see also "Guidelines for Livestock Operations," available at http://www.ohiolivestock.org/images/1_livestock_guidelines03.pdf.

[65] Ohio Rev. Code Ann. § 903.02(A)(2); 903(A)(3); see also "Guidelines for Livestock Operations," available at http://www.ohiolivestock.org/images/1_livestock_guidelines03.pdf.

[66] HB 152 began as a bill to change Ohio law to conform to federal rules about large livestock operations. By the time the law went into effect November 5, 2005, however, it included a "preclusion against local regulation of animal feeding facilities" amendment circulated by the Ohio Farm Bureau: "An owner or operator of an animal feeding facility who holds a permit to install, a permit to operate, a review compliance certificate, or an NPDES permit or who is operating under an operation and management plan...approved by the chief of the division of soil and water conservation in the department of natural resources ... or by the supervisors of the appropriate soil and water conservation district... shall not be required by any political subdivision of the state or any officer, employee, agency, board, commission, department, or other instrumentality of a political subdivision to obtain a license, permit, or other approval pertaining to manure, insects or rodents, odor, or siting requirements for installation of an animal feeding facility." Ohio Rev. Code Ann. § 903.25.

[67] ODA Response to Oral Comments of Jenny Smith, Public Hearing (May 25, 2005), cmt. 8. Pollution investigation reports and complaint logs from OEPA and ODNR also evidence extensive cross-reporting among ODA, ODNR, OEPA, and SWCDs and joint responses to spills that include ODNR, OEPA, and SWCD staff.

[68] ODA list of permitted farms, available at http://www.ohioagriculture.gov/lepp/curr/othr/lepp-ot-permittedfarms.stm (last updated August 3, 2006). These facilities are known as "Concentrated Animal Feeding Facilities" in Ohio but for ease of reference are referred to in this report as CAFOs.

[69] See explanation of animal unit in note 13, above.

[70] Ohio Rev. Code Ann. § 903.02(A)(2); 903(A)(3); see also "Guidelines for Livestock Operations," available at http://www.ohiolivestock.org/images/1_livestock_guidelines03.pdf.

[71] Ohio Rev. Code Ann. § 903.02(A)(2); 903(A)(3); see also "Guidelines for Livestock Operations," available at http://www.ohiolivestock.org/images/1_livestock_guidelines03.pdf.

[72] Minutes from CAFF Advisory Committee Meeting (June 8, 2006), available at http://www.ohioagriculture.gov/pubs/divs/lepp/curr/mtgs/documents/Minutes-approved.6-08-06.pdf.

[73] Ohio Admin. Code § 901:10-5-04(k).

[74] Enforcement procedures are described in Section 903.16 to 903.18 of the Ohio Revised Code. In addition, rules in OAC Chapter 901:10-5 address enforcement, including procedures for enforcement in Rule 901:10-5-03 and penalties in Rule 901:10-5-04.

[75] ODA, Responsiveness Summary to (b)(6) Dairy permit, pp. 9–10 (July 30, 2004), available at http://www.ohioagriculture.gov/lepp/curr/drft/lepp-dp-(b)(6) respsum-080604.pdf.

[76] Ohio Rev. Code Ann. § 903.16(A)(1); Ohio Admin. Code § 901:10-5-03(D)(2).

[77] Ohio Rev. Code Ann. § 903.16(A)(2); Ohio Admin. Code § 901:10-5-03(D)(3).

[78] Ohio Rev. Code Ann. § 903.16(A)(3); Ohio Admin. Code § 901:10-5-03(D)(5).

[79] Ohio Rev. Code Ann. § 903.18; Ohio Admin. Code 901:10-5-05.

[80] Compilation of records provided by ODA.

[81] Id.

[82] OEPA, FY2005 Annual Summary Report.

[83] Data compiled from final orders provided by OEPA to EIP in response to July 28, 2005 public records request.

[84] Data compiled from materials on Disks 1, 2, and 3 (NOV file folders) provided by OEPA to EIP in response to July 28, 2005 public records request.

[85] See Table 7.

[86] Copies of chief's orders provided by ODNR to EIP in response to September 5, 2006 public records request (Order # 2003-1 issued to J. Scott Thomas (April 23, 2003); Order #2005-1 issued to Monte Tuck (June 23, 2005); and Order #2006-1 issued to Terry Miller (June 9, 2006)).

[87] See definitions under ODNR's pollution abatement rules, Ohio Admin. Code 1501:15-5-01(B)(21): "'Field Office Technical Guide' means the localized document used by the soil and water conservation district and developed (current edition) by the natural resources conservation service, United States department of agriculture, which is available to all Ohio County Soil and Water Conservation Districts, and which provides: (a) Soil descriptions; (b) Sound land use alternatives; (c) Adequate conservation treatment alternatives; (d) Standards and specifications of conservation practices; (e) Conservation cost-return information; (f) Practice maintenance requirements; (g) Erosion prediction procedures."

[88] Figures based on data in ODNR complaint entry log (Microsoft Excel files), provided to EIP in response to July 27, 2005 and August 21, 2006 public records requests.

[89] Id.

[90] Id.

[91] Id.

[92] See note 22, above, for explanation of dairy cow's human waste equivalence.

[93] Id.

[94] For historical background on SWCDs, see http://ofswcd.org/artman/publish/article_147.shtml (tracing SWCDs' broadening mission from assisting farmers with cropland erosion in the 1940s to coordinating with OEPA's Nonpoint Source Management Plan in the 1980s).

[95] ODA responsiveness summary for (b)(6) Dairy, p. 9.

[96] Ohio Admin. Code § 1501:15-5-15(B).

[97] Ohio Admin. Code § 1501:15-5-15(D); see also Ohio State University Extension's EQIP factsheet, available at http://ohioline.osu.edu/ae-fact/0002.html.

[98] Information available at http://ofswcd.org/artman/publish/article_153.shtml.

[99] See, e.g., Letter from Dan Batdorf, Chairman of Miami SWCD, to David Hanselmann, Chief of ODNR-DSWC (May 13,2005) ("The Miami SWCD has received four separate complaints from various agencies since 1998 concerning this facility.... Since the summer of 2003, the neighboring community continues to complain about the overflow of manure and the lack of management that is needed for a facility of this age. However, the Miami [SWCD] does not have the authority to enforce upon the operator the type of management that is needed to comply with the Clean Water Act, nor can we convince the operator to discontinue his use of this old and outdated facility.... [We] would like [ODNR] to take corrective action and try to resolve this pollution problem.").

[100] See discussion of ODNR in subsection 3, above.

[101] U.S. EPA, "NPDES Profile: Ohio" (last updated May 3, 2005), available at http://www.epa.gov/npdes/pubs/ohio_final_profile.pdf.

[102] Data compiled from U.S. EPA's Enforcement & Compliance History Online (ECHO) database, available at http://www.epa.gov/echo/. The total is based on the number of facilities with an administrative or judicial order entered through ECHO's Integrated Compliance Information System.

[103] Id.

[104] Id. See also section on "Dirty Half-Dozen" below for more historical background on Ohio Fresh Eggs and its decades' long record of noncompliance.

[105] See, e.g., The Columbus Dispatch, "State Crackdown: Buckeye Egg Rotten To Its Corporate Core" (April 23, 2002) ("Buckeye Egg, which mismanages massive egg-producing farms in four Ohio counties, is a corporate outlaw that for years has polluted the state's air and water, employed illegal aliens and afflicted its neighbors with hellish plagues of flies and beetles.") available at http://libpub.dispatch.com/cgi-bin/documentv1?DBLIST=cd02&DOCNUM=17567&TERMV=302:3:305:4; Dayton Daily News, "Buckeye Egg Farm Violations Among Worst In Country" (December 4, 2002) available at http://www.daytondailynews.com/project/content/project/farm/1204buckeyeegg.html ("Following an April fly outbreak of 'Biblical proportions,' Attorney General Betty Montgomery called the company "the most recalcitrant corporate polluter" her office has seen.") .

[106] Ohio Environmental Council, "Dead in the Water," p. 13.

[107] The Columbus Disptach, "State Crackdown: Buckeye Egg Rotten To Its Corporate Core" (Apr. 23, 2002) available at http://libpub.dispatch.com/cgi-bin/documentv1?DBLIST=cd02&DOCNUM=17567&TERMV=302:3:305:4.

[108] Id.

[109] Documents provided by ODA in response to EIP records request.

[110] ODA Notice of Deficiency issued to Ohio Fresh Eggs (April 5, 2006).

[111] Letter from ODA Director Daily to Donald Hershey, et al. "Re: Proposed Action to Issue a Revocation Order" (Sept. 30, 2005).

[112] Letter from Kevin Elder to Ohio Valley Farms (April 6, 2005) ("ODA conservatively estimates that the seven hog barns at [OHV] have a total design capacity of (b) hogs qualifying [Ohio Valley Farms] as a concentrated animal feeding facility.").

[113] Id. (referencing Ohio Valley Farms' failure to operate as separate facilities as it promised to do in a June 15, 2004 letter to ODA).

[114] ODNR "Complaints" database (Microsoft Excel file) provided to EIP in response to August 22, 2006 public records request.

[115] Id.

[116] Comments from (b)(6) spokesperson, to Concentrated Animal Feeding Facility Advisory Committee (March 10, 2006); Ben Sutherly, "Dairy Dilemma: Debate may last until cows come home" (July 11, 2004), available at http://www.greenlink.org/public/hotissues/dairy.html.

[117] Dayton Daily News, "Lucrative Megafarm Market Lures Europeans" (December 6, 2002) ("Virtually all the Ohio dairies are built to house just under 700 cows.... Environmentalists also believe the (b)(6) dairies intentionally kept their farms below 700 cows until [ODA] assumed [state permitting] authority.") available at http://www.daytondailynews.com/project/content/project/farm/1206future.html.

[118] Notes from telephone conversation between ODA staff and EIP (October 10, 2006).

[119] Data compiled from U.S. EPA Administrative Orders, provided to EIP in Sept. 28, 2006 response to FOIA request.

[120] (b)(6) staff "assisted [dairies] in obtaining from the [ODA] permits to install and operate the new dairy farms." Affidavit of (b)(6) in (b)(6) *Dairy v. ODA*, Civ. No. 06-6473 (Ohio Court of Common Pleas 2006). U.S. EPA administrative orders detail some of the permitting advice and support. For example, in response to the question of "[w]hat promises were made by (b)(6) Dairy Development regarding environmental permitting," "[t]he owner said that (b)(6) told him environmental permits were not necessary for a dairy of this size in Ohio." U.S. EPA Administrative Order, (b)(6) Dairy, Attachment B, p. 4 (Sept. 10, 2004) (the dairy had (b) cows at the time, but ODA has since authorized it to expand to (b) cows). ers and operators have said: (1) (b)(6) promised "environmental support;" U.S. EPA Administrative Order, (b) Dairy, Attachment p. 4 (Sept. 30, 2004); (2) "Prior to construction, the owner requested from (b)(6) a larger lagoon than (b)(6) (b) planned" U.S. EPA Administrative Order, (b)(6) Dairy, Attachment, p. 4 (Dec. 20, 2004) (3) "(b)(6) told the operator that the original lagoon and manure pit provided one year of storage. The operator found that the capacity was in fact closer to 4 months of e." U.S. EPA Administrative Order, (b)(6) (b) Dairy, Attachment p. 3 (Sept. 24, 2004).

[121] Combined figures from ODA, OEPA, ODNR, and U.S. EPA data sources.

[122] Data compiled from U.S. EPA Administrative Orders, provided to EIP in Sept. 28, 2006 response to FOIA request.

[123] U.S. EPA, data available from Enforcement & Compliance History Online (ECHO) database.

[124] Although (b) Farms is included on ODA's published list of 156 permitted facilities, (b) entry is the only one on the list that does not include a permit type or a permit renewal date. Information available at http://www.ohioagriculture.gov/lepp/curr/othr/lepp-ot-permittedfarms.stm.

[125] Letter from OEPA to (b) Farms (July 24, 2002).

[126] Email from ODA legal counsel to EIP (October 11, 2006) ("All of the information required by the original PTI is in the (b) manure management plan of the facility's RCC. With the exception of information on manure sales records, the information is maintained in the operating records and is not submitted in an annual report. Ohio Rev. Code Ann. 903.04(I): "An existing facility that is issued a review compliance certificate shall comply with the previously issued installa-

tion permit, as amended by the certificate." With this in mind, ODA has not pursued an enforcement action against (b) for failure to submit an annual report. The information required by the special condition of the OEPA PTI has been filed with ODA, but in the form of the Manure Management Plan (and the corresponding operating records) and not an annual report.").

[127] Documents provided by ODA to EIP in response to July 27, 2005 public records request.

[128] ODNR Chief's Order #2006-01 (June 9, 2006), pp. 4–8.

[129] Id., p. 5 ("The water analysis report indicated an ammonia concentration of 30.15 ppm.").

[130] Id., pp. 8–9.

[131] Available at http://www.ohioagriculture.gov/pubs/aboutus.stm.

[132] "Getting to know Ohio EPA", available at http://www.epa.state.oh.us/pic/facts/get2know.pdf.

[133] Available at http://www.epa.state.oh.us/pic/facts/AR/dsw.html.

[134] ODA, "Responsiveness summary to public comments on the (b)(6) Dairy draft permit" (August 18, 2004), available at http://www.ohioagriculture.gov/lepp/curr/drft/lepp-dp-(b)(6)respsum-082004.stm.

[135] Minutes from CAFF Advisory Committee Meeting (June 8, 2006), available at http://www.ohioagriculture.gov/pubs/divs/lepp/curr/mtgs/documents/Minutes-approved.6-08-06.pdf.

[136] Comparison based on averaging 885 ODA inspections over 3.75 years (August 2002–May 2006) v. 163 OEPA compliance inspections over 4 years (FY2002–FY2005).

[137] "Major concentrated animal feeding facility" means a Concentrated Animal Feeding Facility with a total design capacity of more than ten times the number of animals specified as operating-permit thresholds. Ohio Rev. Code Ann. § 903.01(N).

[138] Ohio Rev. Code Ann. § 903.7(A)(1).

[139] "Certified CLMs" (Microsoft Excel file) provided by ODA to EIP in response to August 3, 2006 public records request.

[140] Warning letters issued February 9, 2005 to manure applicators (b)(6) (b)(6) As of August 3, 2006, 18 months later, neither person had obtained a certificate. ODA actually provided the names of non-certified manure applicators to (b) Dairy in 2004, in order to help the facility deal with insufficient storage capacity and anticipated land application problems. A trade newsletter for dairy CAFOs also gave readers contact information of a non-certified manure hauler, "[f]or help with cleaning your manure pit."

[141] ODA Complaint investigation report for (b) (b) Dairy (May 9, 2006). As of July 31, 2006, ODA had issued no warning letter against the ODA-certified applicator, (b)(6)

[142] ODA Factsheet, "What is a Background Check?" (emphasis added), available at http://www.ohioagriculture.gov/lepp/curr/fact/lepp-fs-backgroundcheck-120103.pdf.

[143] See discussion of Ohio Fresh Eggs in Part IV above.

[144] See note 84, above.

[145] Letter from Kevin Elder to (b)(6) (June 17, 2004).

[146] Id.

[147] Letter from Kevin Elder to (b)(6) (February 4, 2005).

[148] ODA, Complaint investigation report for (b)(6) Dairy (March 27, 2006).

[149] ODA, Final Order against (b)(6) Dairy (April 19, 2004), provided to EIP in response to July 27, 2005 public records request.

[150] Ohio Admin. Code § 901:10-2-11.

[151] Id.

[152] Ohio Admin. Code § 901:10-1-01(UU).

[153] See ODA, Operating Record (Form 3900-013), p. 1, available at http://www.ohioagriculture.gov/pubs/divs/lepp/frms/lepp-Operating%20Records.pdf ("Manure Bills of Sale are no longer required to be kept in the Operating Record so you may wish to use a separate notebook.").

[154] E.g., Letter from William Hopper, ODA Chief Legal Counsel, to David Gerdeman granting trade secrecy request over land application maps (May 1, 2006) ("The information in the fields identification map shall be maintained by ODA in a separate file labeled 'Confidential'").

[155] Letter from William Hopper, ODA Chief Legal Counsel, to Jack Van Kley (June 21, 2006) (""After discussions with the Office of Attorney General and further review of Ohio law, ODA has revisited its determination..., wherein ODA determined that the fields identification map or land application site maps should be labeled as 'trade secret' [, and it now] intends to release the requested information.").

[156] (b)(6) *Dairy v. ODA*, Civ. No. 06-6473 (Ohio Court of Common Pleas 2006).

[157] Plaintiffs' Voluntary Dismissal, (b)(6) *Dairy v. ODA*, Civ. No. 06-6473 (Ohio Court of Common Pleas Oct. 11, 2006).

[158] Email from ODA legal counsel to EIP (June 26, 2006).

[159] U.S. EPA, Administrative Order to (b)(6) Dairy (Sept. 24, 2004).

[160] ODA response to oral comments of Jenny Smith (May 25, 2005).

[161] See, e.g., Letter from ODA inspector to Logan SWCD (January 15, 2004) (responding to SWCD's inquiry to find out who in ODA's office was responsible for (b)(6) Heartland Egg facility following land application complaints): "I am the inspector in charge of Heartland, but they sell all of their manure. Since they sell it (using what we

refer to as Distribution and Utilization), the responsibility for manure application falls back to the farmer land applying the manure [and] the county SWCDs. ... [U]nless a farmer that has a certified livestock manager certificate from us (or should have) applied the manure (or (b)(6) themselves) there is not much we can do."

[162] Of the 12 facilities most recently issued final permits by ODA, only one indicated in its draft or final permit notice that it would apply waste manure exclusively to its own land. Information available at http://www.ohioagriculture.gov/lepp/lepp-recent.stm.

[163] Email from ODA legal counsel to EIP (June 26, 2006) ((b)(6) Dairy and other proposed dairies in the general area plan to transfer manure, 40 CFR 122.42(e)(3). Land application site maps will no longer be submitted to ODA"). Without land application maps or other information identifying the location of fields slated for manure application, even OEPA had a difficult time determining whether an MMP complies with the law. See Letter from Melinda Harris, OEPA inspector, to (b)(6) Dairy (June 14, 2006) ("[A] few of the planned land application fields may not be acceptable due to the location in the Village of Cygnet's source water protection area. . . . . [P]lease notify this office if any land application fields are located in the protection area, identify those fields by field number, and provide an expected submittal date of a revised [MMP]."

[164] ODA response to oral comments of Jenny Smith (May 25, 2005).

[165] ODA, Responsiveness Summary to (b)(6) Dairy permit, p. 11 (July 30, 2004), available at http://www.ohioagriculture.gov/lepp/curr/drft/lepp-dp-(b)(6) respsum-080604.pdf. See Ohio Admin. Code § 901:10-2-14.

[166] Letter from ODA to Ohio Fresh Eggs (March 3, 2004).

[167] ODNR, "Winter Weather Complicates Manure Application," link available at http://www.dnr.ohio.gov/soilandwater/swcds/swcdresources.htm.

[168] ODA declined to offer an explanation or account after EIP provided it with a list of facilities permitted according to OEPA records, but not clearly permitted in ODA records. An unknown number of these farms may have changed names, stopped operating, or reduced herd size below the permitting threshold.

[169] OEPA, FY 2002 Annual Report ("The State of Ohio has approximately 144 permitted livestock facilities."). Also, OEPA had previously permitted as many as 161 facilities, but about 15 permits apparently corresponded to facilities that closed or were never built. "All AFOs" spreadsheet (Microsoft Access file) provided by Ohio EPA in response to July 28, 2005 records request

[170] ODA Factsheet, "Once ODA is in Charge, What Will Happen with Ohio EPA Permitted Facilities?" (July 2002) ("Ohio EPA has approximately 125 permitted livestock operations."), available at http://www.ohioagriculture.gov/lepp/curr/fact/lepp-fs-rcc-120103.pdf.

[171] Within two years, or by August 2004, all OEPA-permitted facilities were required to submit an application and supporting documentation to ODA to obtain a Review Compliance Certificate (RCC) or PTO. It is possible that more than 99 formerly-permitted facilities are included in ODA's current list, but ODA officials declined requests to account for this disparity. EIP initially identified 77 facilities on OEPA's 2002 permit list that were missing on ODA's August 5, 2006 permit list, available at http://www.ohioagriculture.gov/lepp/curr/othr/lepp-ot-permittedfarms.stm.

[172] For example, ODA issued a notice of deficiency in August 2004 to the (b)(6) farm, formerly permitted by OEPA, for failure to obtain an RCC prior to the 2-year deadline. (b)(6) had not obtained an RCC as of August 2006, with no escalation of enforcement by ODA. However, OEPA issued a Notice of Violation for a manure discharge to waters of the State in January 2005, showing that the facility's "demonstrated negligence and failed manure management" continue.

[173] Ohio Admin. Code § 901:10-2-17 ("The owner or operator shall also file a written report of [a discharge or manure spill] in letter form within five days following first knowledge of the occurrence.").

[174] Information based on conversation between ODA staff and EIP (October 13, 2006).

[175] Id.

[176] Data compiled from copies of complaint investigations provided by ODA to EIP in response to July 27, 2005 public records request.

[177] Ohio Admin. Code § 901:10-2-20 ("[T]he owner of a [CAFO] with an NPDES permit must submit an annual report.").

[178] Telephone conversation between OEPA permitting staff and EIP (October 10, 2006).

[179] OEPA, Response to Public Comments on Revised Draft General NPDES Permit for CAFOs (January 21, 2005), available at http://www.epa.state.oh.us/dsw/cafo/CAFO_Response%20to%20Comments%20on%20Revised%20GP2.pdf.

[180] Wis. Admin. Code § NR 243.14(4); *Maple Leaf Farmers, Inc. v. WDNR*, 633 N.W.2d 720 (Wisc. 2001)(holding WDNR's enforcement of permit provisions is valid even when the the manure was landspread offsite). WDNR is currently proposing amending these rules. The proposed rule maintains producer-based liability, but expands the circumstances in which liability can be transferred and specifies howto transfer liability. WDNR must still approve of the transferred liability, and can only do so if certain requirements are met. The proposed rules explicitly state that the producer maintains liability if WDNR approval is not obtained in writing. Proposed Rule § NR 243.142 "Responsibility for large CAFO manure and process wastewater," available at

http://www.dnr.state.wi.us/org/water/wm/nps/rules/nr243/NR243.htm.

[181] Ohio Admin. Code § 1501:15-5-01.

[182] Estimates drawn from telephone conversations with ODA staff (July 2006) and OEPA staff (August 24, 2006). See also Ohio Livestock Coalition, "Guidelines for Livestock Operations," (November 2003) p. 4, available at http://www.ohiolivestock.org/images/1_livestock_guidelines03.pdf ("Slightly less than half of Ohio's 78,000 farms have some type of livestock operation.").